Hastings Law Journal

Volume 18 | Issue 4 Article 6

1-1967

The Ambiguous, Amphibious Employee: The Relationship between the Longshoremen's Act and State Compensation Legislation

Dinko J. Bozanich

COMMENTS

THE AMBIGUOUS, AMPHIBIOUS EMPLOYEE: THE RELATIONSHIP BETWEEN THE LONGSHOREMEN'S ACT AND STATE COMPENSATION LEGISLATION

By DINKO J. BOZANICH*

FIFTY years ago in *Southern Pac. Co. v. Jensen*,[1] the Supreme Court held unconstitutional the application of a state compensation statute to the employee of a railroad who was fatally injured while working as a stevedore unloading his employer's vessel lying on navigable waters.[2] Despite two immediate congressional attempts to authorize state compensation for employment injuries occurring within the tort jurisdiction of admiralty, the Supreme Court steadfastly adhered to the constitutional lines drawn in *Jensen*.[3] Subsequent cases revealed, however, that *Jensen* did not absolutely preclude state compensation to all employees injured on navigable waters,[4] although longshoremen and other harbor workers remained without the remedy of workmen's compensation. In order to provide the large number of such workers with the benefits of compensation, Congress, in 1927, enacted the Longshoremen's and Harbor Workers' Compensation Act.[5] As drafted, however, the scope of federal coverage was not precisely outlined with the result that the extent of state coverage also became unclear.[6] Because federal and state compensation coverage appeared to be mutually exclusive, state and federal courts utilized doctrines known as "maritime but local," "local concern," and the intriguing, obscure "twilight zone" to retain segregation between presumed conflicting compensation schemes.[7] This judicial legerdemain flourished until

---

* Member, Third Year Class.

1 244 U.S. 205 (1917).

2 Compare Clyde S.S. Co. v. Walker, 244 U.S. 255 (1917) which held the same state statute unconstitutional as applied to a longshoreman unloading his employer's vessel on navigable waters.

3 Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920); Washington v. W C. Dawson & Co., 264 U.S. 219, 1924 A.M.C. 403 (1924).

4 *E.g.*, Sultan Ry. v. Department of Labor, 277 U.S. 135, 1928 A.M.C. 936 (1928).

5 44 Stat. 1424 (1927), 33 U.S.C. §§ 901-50 (1964).

6 *Compare* Continental Cas. Co. v. Lawson, 64 F.2d 802, 805, 1933 A.M.C. 794, 797-98 (5th Cir. 1933) (Congress intended to exercise its fullest power and exclude state coverage), *with* United States Cas. Co. v. Taylor, 64 F.2d 521, 524, 1933 A.M.C. 1200, 1205 (4th Cir. 1933) (federal compensation available only when state coverage constitutionally precluded).

7 2 LARSON, WORKMEN'S COMENSATION LAW §§ 89.22-.24 (1961).

1962 when the Supreme Court in *Calbeck v. Travelers Ins. Co.*[8] explicitly held that the federal act covered injuries on navigable waters even though a state compensation statute constitutionally could have applied.

The purpose of this comment is to analyze closely the developments since *Jensen* and determine what compensation statute, or statutes, may be invoked by the amphibious employee injured on navigable waters as a remedy against his employer. Necessarily, this will entail an examination of how far seaward state compensation statutes may constitutionally apply, as well as a determination of how far toward shore federal compensation coverage extends. Finally, since *Calbeck* specifically recognized an area of concurrent coverage, the problem of election of remedies must be considered.

JENSEN AND ITS CONSEQUENCES

While *Jensen* has been severely criticized and limited, it has never been overruled and continues to enjoy both validity and vitality in the field of workmen's compensation. Consequently, it is necessary to analyze very closely the rationale advocated by Justice McReynolds in this famous 5-4 decision.

The basic premise of *Jensen* is that the extension of the federal judicial power "to all Cases of admiralty and maritime Jurisdiction"[9] coupled with congressional authority to legislate within that sphere under the necessary and proper clause of the Constitution constitutes a significantly different federal authority than the mere power to regulate interstate and foreign commerce delegated to Congress in the commerce clause. In the absence of congressional action under the commerce clause there is no existing body of federal law.[10] However, even in the absence of congressional action under the necessary and proper clause, the Constitution had incorporated into it a body of general maritime law which must be applied by federal courts to cases coming within the admiralty jurisdiction.[11] This distinction makes it clear that a federal substantive maritime law exists without regard to any exercise of congressional power.

Justice McReynolds, however, went on to point out that more than this body of general maritime law was applied by federal courts to matters coming within the admiralty jurisdiction. Although the Judiciary Act of 1789[12] had vested the federal courts with exclusive jurisdiction over civil actions within the jurisdiction of admiralty,

[8] 370 U.S. 114, 1962 A.M.C. 1413 (1962).

[9] U.S. CONST. art. III, § 2.

[10] Southern Pac. Co. v. Jensen, 244 U.S. 205, 217 (1917).

[11] *Id.* at 215.

[12] 1 Stat. 76 (1789).

it had also saved to suitors the right to pursue a common law remedy where the common law was competent to give it. Conceding that the general maritime law could be changed, modified or affected by state legislation and consequently be enforced in admiralty by virtue of the saving clause,[13] Justice McReynolds vigorously asserted that this state power was not unlimited. He then proceeded to articulate three related, but independent, tests to be used in ascertaining the limits of state power. Basing the first test on the supremacy clause and the second and third on the substantive maritime law embedded in the Constitution, Justice McReynolds asserted state legislation was invalid "[1] if it contravenes the essential purpose expressed by an act of Congress or [2] works material prejudice to the characteristic features of the general maritime law or [3] interferes with the proper harmony and uniformity of that law in its international and interstate relations."[14]

After stating that these limitations upon state power were necessary to protect the fundamental purposes for which the general maritime law was incorporated into the national laws by the Constitution,[15] Justice McReynolds evaluated the facts before the Court. Pursuant to its use in interstate commerce, a vessel owned and operated by the Southern Pacific Railroad was being unloaded while lying in the navigable waters of New York Harbor. While engaged in unloading the vessel, and thereby performing the duties of a stevedore, Christian Jensen, an employee of the railroad, sustained fatal injuries on a gangway connecting the pier and his employer's vessel. Justice McReynolds recognized that these facts were clearly within the jurisdiction of admiralty and thus subject to the general maritime law embodied in the Constitution.[16] Admiralty contract jurisdiction was supported by the fact that Jensen's employment was a maritime contract, and admiralty tort jurisdiction was clear because Jensen was injured upon navigable waters. Furthermore, the work of a stevedore was maritime in nature.[17] The New York courts, however, had sustained an award to Jensen's widow and children under the state compensation statute which imposed upon the employer liability without fault and abrogated all other remedies available to the employee, including those provided by the general maritime law.[18] Therefore, the question before the Supreme Court was whether or not the application of such a state statute was invalid to the extent

[13] Southern Pac. Co. v. Jensen, 244 U.S. 205, 216 (1917).

[14] *Ibid.*

[15] *Ibid.*

[16] *Id.* at 217.

[17] *E.g.*, Atlantic Transp. Co. v. Imbrovek, 234 U.S. 52 (1914).

[18] Jensen v. Southern Pac. Co., 215 N.Y. 514, 109 N.E. 600 (1915).

that it conflicted with the general maritime law which constituted an integral part of federal law under the Constitution.[19]

Relying upon the last two constitutional tests previously outlined, the application of the New York compensation statute in these circumstances was held unconstitutional on two grounds. First, the result would interfere with the proper harmony and uniformity of the general maritime law in its interstate and international relations because the various seaport states could subject shipowners to vastly different rights and liabilities.[20] Second, its application would work material prejudice to the characteristic features of the general maritime law since the remedy was unknown to the common law and the saving clause did not preserve remedies unknown to the common law.[21] Because the Judiciary Act of 1789 was merely jurisdictional in nature rather than an "applicable act of Congress"[22] as used by Justice McReynolds, his first test couched in terms of choice of law was not used in striking down the attempted application of the New York compensation statute in *Jensen.*

Within six months after *Jensen,* Congress attempted to authorize the application of state compensation statutes to employment injuries occurring within the admiralty jurisdiction by amending the saving clause to preserve "to claimants the rights and remedies under the workmen's compensation law of any State. "[23] Reaffirming the constitutional basis of *Jensen* the Supreme Court struck down this legislation as an unconstitutional delegation to the states of the congressional power to regulate maritime affairs.[24] More specifically, Congress could not sanction the virtually certain disruption of maritime uniformity that would result from the application of different state workmen's compensation statutes.[25]

Upon concluding that the 1917 amendment was held invalid because it had been drawn to cover seamen as well as harbor workers, Congress tried again in 1922 to sanction state compensation coverage by amending the saving clause to preserve to "claimants for compensation . other than the master or members of the crew of a vessel their rights and remedies under the workmen's compensation law of any State. . "[26] While recognizing that the amendment did not purport to cover seamen, the Supreme Court nevertheless interpreted it to be substantially the same as the 1917 statute and declared it to

---

[19] Southern Pac. Co. v. Jensen, 244 U.S. 205, 217 (1917).
[20] *Id.* at 217-18.
[21] *Id.* at 218.
[22] *Id.* at 216.
[23] 40 Stat. 395 (1917).
[24] Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920).
[25] *Id.* at 164.
[26] 42 Stat. 634 (1922).

be an unconstitutional delegation of congressional power because it was broad enough to authorize state compensation coverage to stevedores unloading vessels upon navigable waters, thereby raising the same constitutional objections announced in *Jensen*.[27]

While the tenor of these decisions appeared to preclude state compensation benefits to all employees injured within the jurisdiction of admiralty, it soon became clear from cases like *Grant Smith-Porter Co. v. Rohde*[28] that *Jensen* was not an absolute bar. In *Rohde* the Supreme Court upheld the exclusive remedy provided by a state compensation statute to a carpenter who sought damages in admiralty against his employer for injuries received while working on a partially completed vessel lying in navigable waters. Although ship construction contracts are not within the admiralty jurisdiction over contracts,[29] the accident had occurred on navigable waters and was thus of a kind ordinarily within the tort jurisdiction of admiralty.[30] Clearly the general maritime law was applicable unless it had been constitutionally changed, modified or affected by state legislation.[31] Since Oregon had enacted a compensation statute which prescribed an exclusive remedy that purported to abrogate any existing maritime remedies against the employer,[32] the action for damages in admiralty would have to be dismissed unless giving effect to the state legislation would work material prejudice to the general maritime law or impair maritime uniformity. Upon holding that neither the general employment nor the workman's activities had any direct relation to navigation or commerce, the injury was held to be essentially a local matter constitutionally within the operation of the state compensation statute and the action in admiralty barred.[33]

The impetus of *Rohde* led to a series of decisions that continued to whittle away at *Jensen* by defining a field within the tort jurisdiction of admiralty wherein a state could constitutionally provide an exclusive compensation remedy and thereby abrogate any existing general maritime remedies against the employer. This exception to, or clarification of, *Jensen* became known as the doctrine of "maritime but local" or "local concern."[34] Some indications of what the Supreme

[27] Washington v. W. C. Dawson & Co., 264 U.S. 219, 1924 A.M.C. 403 (1924).

[28] 257 U.S. 469 (1922).

[29] *E.g.*, North Pac. S.S. Co. v. Hall Bros., 249 U.S. 119, 126-27 (1919).

[30] *E.g.*, The Admiral Peoples, 295 U.S. 649, 651, 1935 A.M.C. 875, 876 (1935).

[31] Grant Smith-Porter Co. v. Rohde, 257 U.S. 469, 477 (1922).

[32] *Id.* at 476-77.

[33] *Id.* at 477-78.

[34] *E.g.*, Calbeck v. Travelers Ins. Co., 370 U.S. 114, 119, 1962 A.M.C. 1413, 1417 (1962).

Hereafter the doctrine used to sustain constitutionally valid state coverage on navigable waters will be referred to as "local concern" rather than "maritime but local." The use of the word "maritime" in the latter context confuses analysis because it does not

Court considered to be of only local concern may be gathered from an examination of the decisions subsequent to *Rohde:* a diver employed to remove obstructions to navigation in a navigable river;[35] men engaged in logging operations upon navigable waters;[36] a clerk inspecting lumber aboard a vessel being unloaded;[37] an employee engaged in the construction of a pier;[38] and a cannery worker trying to launch a small boat.[39] While holding these injuries to be constitutionally within the scope of state compensation, the Supreme Court nevertheless adhered to the *Jensen* rationale and stated that such compensation neither materially prejudiced the characteristic features of the general maritime law nor impaired the uniformity of that law in its international or interstate relations.[40]

It is important to recognize that in the cases upholding state compensation there was no applicable congressional legislation and thus it was not necessary to determine whether state legislation contravened an applicable act of Congress. The sole question to be resolved was whether the application of state compensation would violate the second and third principles articulated in *Jensen.* Furthermore, proper analysis of "local concern" as a means of permitting state compensa-

distinguish between whether it is being used to describe the situs of the injury, the subject matter of the employment contract, or both. Using "local concern" retains the underlying distinction made by Supreme Court decisions that state compensation for injuries on navigable waters was unconstitutional only when the subject matter of the employment contract was within the contract jurisdiction of admiralty. *Compare Ex parte* Rosengrant, 213 Ala. 202, 104 So. 409, 1925 A.M.C. 1079 (1925), *aff'd per curiam sub nom.* Rosengrant v. Havard, 273 U.S. 664 (1927) (state court held absence of admiralty contract jurisdiction permitted state coverage), *with* Lahti v. Terry & Tench Co., 240 N.Y. 292, 148 N.E. 527 (1925), *rev'd per curiam sub nom.* Industrial Bd. v. Terry & Tench Co., 273 U.S. 639 (1926) (state court held absence of admiralty contract jurisdiction was irrelevant in denying state coverage).

See Southern Pac. Co. v. Jensen, 244 U.S. 205 (1917) (longshoring); John Baizley Iron Works v. Span, 281 U.S. 222 (1930) (ship repairs); London Guar. & Assur. Co. v. Industrial Acc. Comm'n, 279 U.S. 109 (1929) (navigation). In each of these cases the subject matter of the employment contracts clearly were within the admiralty contract jurisdiction and state compensation was denied. Justice McReynolds illustrated this principle in John Baizley Iron Works v. Span, *supra* at 224: "No case presents a 'matter of mere local concern' in which concur the facts: (1) that the employee was working under a maritime contract "

[35] Millers' Indem. Underwriters v. Braud, 270 U.S. 59, 1926 A.M.C. 310 (1926).

[36] Sultan Ry. v. Department of Labor, 277 U.S. 135, 1928 A.M.C. 936 (1928).

[37] Rosengrant v. Havard, 273 U.S. 664 (1927), *affirming per curiam Ex parte* Rosengrant, 213 Ala. 202, 104 So. 409, 1925 A.M.C. 1079 (1925).

[38] Industrial Bd. v. Terry & Tench Co., 273 U.S. 639 (1926), *reversing per curiam* Lahti v. Terry & Tench Co., 240 N.Y. 292, 148 N.E. 527 (1925).

[39] Alaska Packers Ass'n v. Industrial Acc. Comm'n, 276 U.S. 467, 1928 A.M.C. 768 (1928) (employment held of local concern without passing on question of admiralty jurisdiction).

[40] See, *e.g.*, Davis v. Department of Labor, 317 U.S. 249, 252, 1942 A.M.C. 1653, 1654 (1942).

tion to constitutionally apply did not mean that federal and state jurisdiction over employment injuries occurring upon navigable waters were mutually exclusive with the line of demarcation drawn by the Constitution. What it did mean was that once state legislation modifying, changing or affecting the general maritime law could constitutionally apply, it was the exclusive nature of the state compensation remedy that abrogated any remedies the employee may have otherwise had against his employer under the common law or the general maritime law

In addition to "local concern" as a basis to validate state compensation for injuries upon navigable waters, the Supreme Court made it clear that the constitutional lines drawn in *Jensen* were completely inapplicable when the injury occurred upon land or an extension thereof, without regard to the broader jurisdiction of admiralty over maritime contracts.[41] Thus a longshoreman engaged in loading or unloading a vessel upon navigable waters who was within the admiralty jurisdiction by virtue of the status of his employment was nevertheless exclusively within the domain of state law if his injury occurred upon shore.[42]

During the development of the doctrine of "local concern" the Supreme Court considered other cases where it held that the application of state compensation would violate the constitutional lines drawn in *Jensen*. Held to be within the jurisdiction of admiralty so that state compensation was constitutionally inapplicable were those injuries sustained by repairmen working on completed ships lying in navigable waters,[43] by longshoremen injured aboard vessels on navigable waters while engaged in loading or unloading,[44] and by seamen.[45]

---

[41] Industrial Comm'n v. Nordenholt Corp., 259 U.S. 263 (1922). See T. Smith & Son v. Taylor, 276 U.S. 179, 1928 A.M.C. 447 (1928); Alaska Packers Ass'n v. Industrial Acc. Comm'n, 276 U.S. 467, 1928 A.M.C. 768 (1928).

[42] T. Smith & Son v. Taylor, *supra* note 41, Industrial Comm'n v. Nordenholt Corp., *supra* note 41.

[43] John Baizley Iron Works v. Span, 281 U.S. 222, 1930 A.M.C. 755 (1930). See Messel v. Foundation Co., 274 U.S. 427, 1927 A.M.C. 1047 (1927); Robins Dry Dock & Repair Co. v. Dahl, 266 U.S. 449, 1925 A.M.C. 182 (1925); Gonsalves v. Morse Dry Dock & Repair Co., 266 U.S. 171, 1924 A.M.C. 1539 (1924); Great Lakes Dredge & Dock Co. v. Kierejewski, 261 U.S. 479, 1923 A.M.C. 441 (1923).

[44] Northern Coal Co. v. Strand, 278 U.S. 142, 1929 A.M.C. 64 (1928); Washington v. W C. Dawson & Co., 264 U.S. 219, 1924 A.M.C. 403 (1924); Peters v. Veasey, 251 U.S. 121 (1919); Clyde S.S. Co. v. Walker, 244 U.S. 255 (1917). *Accord,* Employers' Liab. Assur. Co. v. Cook, 281 U.S. 233, 1930 A.M.C. 760 (1930); Southern Pac. Co. v. Jensen, 244 U.S. 205 (1917).

[45] London Guar. & Acc. Co. v. Industrial Acc. Comm'n, 279 U.S. 109, 1929 A.M.C. 495 (1929); Steamship Bowdoin Co. v. Industrial Acc. Comm'n, 246 U.S. 648 (1918), *reversing per curiam* Steamship Bowdoin Co. v. Pillsbury, 174 Cal. 390, 163 Pac. 204 (1917). See North Pac. S.S. Co. v. Industrial Acc. Comm'n, 174 Cal. 346, 163 Pac. 199

Within ten years after *Jensen* it was clear that state compensation applied to any employment injuries on shore without regard to any maritime connections that could be asserted; that state compensation validly applied to an employment injury upon navigable waters if the particular facts showed that the employee was engaged in activities of local concern; and that repairmen working on completed ships, longshoremen, and seamen who were injured on navigable waters were constitutionally ineligible for state compensation.

THE LONGSHOREMEN'S ACT

In 1927 Congress followed a suggestion of the Supreme Court that a federal compensation statute be enacted to provide the accepted and desired remedy of workmen's compensation to the multitude of workers constitutionally excluded from state coverage.[46] The problem before Congress was to what extent it should exercise its authority to cover employment injuries occurring within the admiralty jurisdiction, both on land and water. Passage of a statute purporting to extend coverage to injuries suffered on land, however, would not only conflict with the demonstrated congressional desire to permit as much state coverage as possible, but might also raise constitutional questions concerning the authority of Congress to cover maritime injuries occurring on land.[47] A subsidiary consideration was whether federal coverage should be extended to all employees, only maritime employees, or only the employees of maritime employers.

If Congress decided to limit federal coverage to employment injuries and deaths on navigable waters, the question was to what extent it should exercise its power over navigable waters. The determination of this question required a choice of one of three alternatives. Congress could preempt all state coverage for injuries upon navigable waters and thereby exercise its fullest power, or it could restrict

(1917) which was impliedly reversed by the decision of the Supreme Court in Steamship Bowdoin Co. v. Industrial Acc. Comm'n, *supra*.

Long before the existence of workmen's compensation legislation, seamen had the right to maintenance and cure under the general maritime law for illness or injury occurring while in the service of the ship. Although this liability of the shipowner resembles compensation because it is a liability without fault based on the employment relationship, maintenance and cure is a much broader remedy than that provided by any compensation statute. Furthermore, the right to maintenance and cure has not been the exclusive remedy of the seaman against his employer. GILMORE & BLACK, ADMIRALTY § 6-6 (1957). Clearly, the application of a state compensation statute to a seaman would work material prejudice to the characteristic features of the general maritime law. The seaman, however, was not left remediless like those other amphibious workers precluded from state compensation by the *Jensen* line of decisions.

[46] Washington v. W C. Dawson & Co., 264 U.S. 219, 227, 1924 A.M.C. 403, 409 (1924).

[47] GILMORE & BLACK, ADMIRALTY § 6-46, at 339 (1957).

federal coverage to the employees excluded from state compensation by *Jensen* and its progeny In between these two extremes Congress could protect all workers injured upon navigable waters, but nevertheless sanction state coverage within the constitutional limitations outlined by *Jensen.* The latter alternative was available because congressional action does not automatically constitute preemption of state power.[48]

Passage of a federal statute restricted to navigable waters would introduce a new factor into compensation claims for injuries on such waters because there would now be an "applicable act of Congress" as used by Justice McReynolds.[49] Since the congressional purpose was to provide compensation to those constitutionally excluded from state coverage, the scope of federal coverage required precise definition if conflicts with valid state legislation were to be avoided. Unless Congress explicitly declared that the coverage of federal and state compensation statutes was to be mutually exclusive,[50] there would appear to be an area of overlap and Justice McReynolds' as yet unused choice of law test would emerge to raise questions of concurrent coverage and preemption.[51]

Confronted with these alternatives, whether clearly recognized or not, Congress enacted the Longshoremen's and Harbor Workers' Compensation Act.[52] Section 3(a) was the primary provision defining the extent of federal coverage:

> Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law.[53]

As finally adopted, the Longshoremen's Act made it at least clear that Congress had restricted recovery of federal compensation to injuries

---

[48] The supremacy clause in article VI of the Constitution is far from an absolute bar to both state and federal legislation in the same field. *E.g.*, Missouri K. & T. Ry. v. Haber, 169 U.S. 613, 623 (1898).

[49] "[S]tate statutes may not contravene an applicable act of Congress " Southern Pac. Co. v. Jensen, 244 U.S. 205, 216 (1917).

[50] If Congress explicitly declared mutually exclusive compensation coverage, a fortiori, there would be no "applicable act of Congress."

[51] Even if state compensation legislation did not conflict with the general maritime law incorporated into the Constitution nor impair maritime uniformity, Justice McReynolds had clearly pointed out the supremacy clause by phrasing a choice of law test which would render state legislation invalid "if it contravenes the essential purpose expressed by an act of Congress " Southern Pac. Co. v. Jensen, 244 U.S. 205, 216 (1917).

[52] 44 Stat. 1424 (1927), 33 U.S.C. §§ 901-50 (1964).

[53] 44 Stat. 1426 (1927), 33 U.S.C. § 903(a) (1964).

sustained on navigable waters. The physical area of coverage, however, was the only clear choice of alternatives expressed by the statute because the language therein did not precisely state to what extent federal compensation was to be available for such injuries. Assuming that the "and if" in the phrase "and if recovery may not validly be provided by State law" was used in a conjunctive sense, section 3(a) apparently imposed two conditions precedent for recovery of federal compensation: (1) injury upon navigable waters; and (2) a determination that state compensation could not constitutionally apply This implied that Congress chose to protect only those employees precluded from state compensation by *Jensen*. However, reading the same phrase as a disjunctive to the preceding phrase indicated that the Longshoremen's Act provided compensation for all injuries on navigable waters without preempting state coverage where it was constitutionally available.[54]

The interpretation judicially adopted was crucial to the administration of workmen's compensation because each interpretation would lead to significantly diverse consequences. Under either interpretation, state legislation still applied when constitutionally valid, and federal compensation was the only remedy in the field excluded from state compensation. Thus a congressional purpose to provide compensation to those workers precluded from state coverage, while leaving as much as constitutionally possible to state compensation, was accomplished under both interpretations. However, while the line defining state coverage remained static under either interpretation, the line defining the extent of federal coverage depended upon the interpretation adopted.

The conjunctive interpretation would result in mutually exclusive coverage between federal and state compensation statutes.[55] Such an interpretation—that Congress accepted the line limiting state power as a limitation upon federal coverage—would seriously impair the purpose of compensation to provide quick and certain relief, because an employee injured in the questionable area of valid state coverage would face constitutional questions regardless of which compensation was initially invoked.[56] Obviously, the injection of

---

[54] See Longshoremen's Act, Opinion No. 30, United States Employees' Compensation Commission, Washington, January 26, 1928, 1928 A.M.C. 417 [hereinafter cited as Longshoremen's Act, Opinion No. 30]. Many inquiries from employers and carriers concerning the meaning and purpose of section 3(a) led to this promulgation by the commission charged with administration of the Longshoremen's Act.

[55] See Longshoremen's Act, Opinion No. 30, where the commission charged with administering the Longshoremen's Act initially adopted such an interpretation.

[56] See Longshoremen's Act, Opinion No. 30, where the federal administrative authority initially believed that such a problem would cause no great difficulty. "Like other questions arising under the longshoremen's act no doubt the drawing of the line

constitutional questions concerning state power into the administration of federal compensation was not desirable, especially since the constitutional standards enunciated in *Jensen* had been couched in general terms and had to be applied by judges or administrative authorities with varying interpretations of where the line should be drawn when confronted with a particular set of facts.

This contrasts with a disjunctive interpretation that would result in an area of concurrent coverage. Under this interpretation—that federal coverage was extended beyond the line fixing the limits of state power without preempting state coverage—the purpose of compensation would be maximized because federal compensation could be invoked with certainty as a supplemental compensation remedy by those amphibious workers injured upon navigable waters who otherwise might have to overcome constitutional objections in order to invoke state compensation successfully

The other provisions of the Longshoremen's Act did not detract from the policy factors that weighed heavily against interpreting the ambiguous language in section 3(a) as limiting federal compensation to injuries excluded from state coverage by *Jensen* because they support neither interpretation. In fact the rest of the Longshoremen's Act made it clear that the extent of federal coverage depended solely on the interpretation given to section 3(a).

The employees to be covered by federal compensation were not precisely defined in section 2(3) [57] The negative language used in this provision included all employees except those specifically excluded:

> The term "employee" does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.[58]

It was clear that Congress intended by this language to extend coverage to employees to whom state compensation was unavailable under the *Jensen* line of decisions. However, by precisely excluding a master or member of a crew of any vessel, Congress only preserved the seaman's action for negligence under the Jones Act[59] and his traditional remedy of maintenance and cure,[60] while it abrogated the longshore-

---

between Federal and State jurisdiction will still be the subject of decisions by the courts and ultimately by the Supreme Court of the United States. Until such authoritative decisions are rendered the Commission invites conference and the co-operation by State authorities in the interpretation of both Federal and State compensation laws to the end that conflict may be avoided and the best interests of the beneficiaries and of the orderly administration of Federal and State legislation may be served." *Id.* at 422.

[57] 44 Stat. 1425 (1927), 33 U.S.C. § 902(3) (1964).

[58] *Ibid.*

[59] 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1958).

[60] See text accompanying note 45 *supra.*

man's remedy as a seaman within the meaning of the Jones Act.[61] Hence many employees were included under this provision who were also already within the coverage of state compensation.

The scope of coverage under the Longshoremen's Act could have been clearly indicated by section 2(4)[62] which defined employers, because an employee is not entitled to compensation unless his employer is within the terms of a compensation statute:

> The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock.)[63]

Since the employer was to be subject to the Longshoremen's Act as long as one employee was employed in maritime employment on navigable waters, even if only in part, Congress could have contemplated that the other employees of such an employer injured on navigable waters, even though not engaged in maritime duties at the time of the injury, would be entitled to federal compensation without regard to the applicability of a state compensation statute. Section 2(4) is thus of little assistance in discovering which alternative Congress chose.

Finally, section 5,[64] which purported to impose exclusive liability upon the employer, was latently ambiguous on the extent of coverage provided. As generally enacted, state compensation was a statutory scheme supplanting the employee's existing common law remedies against his employer and, when constitutionally applicable to injuries upon navigable waters, it also abrogated the remedies available under the general maritime law.[65] Consequently, if Congress actually intended to adopt mutually exclusive coverage or preempt state compensation, it should have expressly specified that the employer's liability was exclusive of any state compensation legislation. Careful scrutiny of section 5, however, reveals that the employer's liability for federal compensation merely precluded the employee from maintaining an action at law or in admiralty without making any reference

[61] Six months prior to the passage of the Longshoremen's Act, the Supreme Court had partially offset the denial of state compensation to longshoremen by holding that longshoremen could bring an action for negligence as "seamen" within the meaning of the Jones Act. International Stevedoring Co. v. Haverty, 272 U.S. 50, 1926 A.M.C. 1638 (1926). By the use of the words "master or member of a crew" rather than "seamen" Congress rendered obsolete the holding in International Stevedoring Co. v. Haverty, *supra.* South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251, 256-57, 1940 A.M.C. 327, 330-31 (1940).

[62] 44 Stat. 1425 (1927), 33 U.S.C. § 902(4) (1964).

[63] *Ibid.*

[64] 44 Stat. 1426 (1927), 33 U.S.C. § 905 (1964).

[65] *E.g.*, Grant Smith-Porter Co. v. Rohde, 257 U.S. 469 (1922).

whatever to the potential liability of an employer under an applicable state compensation statute:

> The liability of an employer prescribed in section 4 shall be exclusive and in place of all other liability of such employer to the employee to recover damages from such employer at law or in admiralty on account of such injury or death [66]

Reference to section 4[67] shows that the obligation of the employer was only to provide federal compensation as prescribed once the Longshoremen's Act was applicable:

> Every employer shall be liable for and shall secure the payment to his employees of the compensation payable [68]

Clearly, as long as federal compensation was the only available compensation legislation, no recovery of state compensation was possible, and section 5 abrogated any remedies available to the employee against his employer either at law or in admiralty However, if there was an area of concurrent coverage provided by the Longshoremen's Act, an employee entitled to a choice of compensation schemes would not be precluded from invoking the benefits of state compensation legislation. Therefore, section 5 was no help by itself in resolving the extent of federal coverage provided by Congress.

Of the three alternatives that Congress could have chosen, the various provisions of the Longshoremen's Act indicate only that Congress did not choose to preempt state coverage. While section 3(a) did not precisely define the limits of federal coverage, the language therein obviously could not support a contention that the Longshoremen's Act had preempted the application of constitutionally valid state compensation.[69] The provisions defining employers and employees, however, could be asserted as indicating that Congress intended to provide the only compensation remedy to all employees injured on navigable waters with certain limited exceptions. But the previously demonstrated congressional desire to allow as much state coverage as possible precluded such an interpretation in the absence of an express declaration by Congress.

Even though state compensation was to remain operative, an extensive analysis of the language in the Longshoremen's Act has established that it left unclear whether federal coverage was limited to that field where state compensation would be unconstitutional or

[66] 44 Stat. 1426 (1927), 33 U.S.C. § 905 (1964).

[67] 44 Stat. 1426 (1927), 33 U.S.C. § 904 (1964).

[68] *Ibid.*

[69] *But see* Continental Cas. Co. v. Lawson, 64 F.2d 802, 805, 1933 A.M.C. 794, 797-98 (5th Cir. 1933) (dictum).

extended to all injuries on navigable waters without preempting state coverage. Furthermore, the obvious result of interpreting federal coverage to be restricted solely to that field beyond state power would be the frustration of the purpose of compensation because constitutional questions regarding state coverage would be raised in all federal claims except those brought by longshoremen and ship repairmen.[70] Since counsel of compensation claimants were less than adept at recognizing these policy factors and the statutory ambiguity, it soon became clear that repeated judicial refinement concerning the constitutional limitations upon state power was leading to hopeless uncertainty in determining whether federal or state compensation was the proper remedy regardless of whether federal or state relief was initially invoked.

Led by the Second,[71] Fourth[72] and Ninth Circuits,[73] the lower federal courts unanimously held that section 3(a) and other imprecise provisions of the Longshoremen's Act provided federal compensation for injuries upon navigable waters only when state coverage was precluded by the Constitution.[74] This interpretation led to the utilization of "local concern" as a defense to claims for federal compensation[75] because these courts failed to recognize that constitutional questions regarding state coverage would arise in all claims under the Longshoremen's Act where the facts deviated from prior precedent. Any asserted ambiguity concerning the extent of federal coverage was dismissed by reliance upon the congressional intent to provide coverage to those amphibious workers denied the benefits of

[70] Seamen were excluded from state compensation by the *Jensen* line of decisions, note 45 *supra*, and excluded from federal compensation by § 2(3) and subsection (1) of § 3(a) of the Longshoremen's Act. 44 Stat. 1425-26 (1927), 33 U.S.C. §§ 902(3), 903 (a)1 (1964).

[71] New Amsterdam Cas. Co. v. McManigal, 87 F.2d 332, 1937 A.M.C. 36 (2d Cir. 1937).

[72] United States Cas. Co. v. Taylor, 64 F.2d 521, 1933 A.M.C. 1200 (4th Cir.), *cert. denied*, 290 U.S. 639 (1933); Motor Boat Sales, Inc. v. Parker, 116 F.2d 789, 1941 A.M.C. 31 (4th Cir.), *rev'd*, 314 U.S. 244, 1942 A.M.C. 1 (1941); Baltimore & O. R.R. v. Parker, 4 F Supp. 815, 816, 1934 A.M.C. 79, 80 (D. Md. 1933) (dictum), *rev'd on other grounds sub nom.* De Wald v. Baltimore & O.R.R., 71 F.2d 810, 1934 A.M.C. 1110 (4th Cir.), *cert. denied*, 293 U.S. 581, 1934 A.M.C. 1409 (1934).

[73] Alaska Packers Ass'n v. Marshall, 95 F.2d 279, 1938 A.M.C. 821 (9th Cir. 1938). See Puget Sound Nav. Co. v. Marshall, 31 F Supp. 903, 907, 1940 A.M.C. 398, 402-03 (W.D. Wash. 1940).

[74] *But see* Continental Cas. Co. v. Lawson, 64 F.2d 802, 805, 1933 A.M.C. 794, 797-98 (5th Cir. 1933) (dictum). Compare in the same circuit, T. J. Moss Tie Co. v. Tanner, 44 F.2d 928, 930-31, 1931 A.M.C. 478, 481-83 (5th Cir. 1930), *cert. denied*, 283 U.S. 829 (1931).

[75] New Amsterdam Cas. Co. v. McManigal, 87 F.2d 332, 334-35, 1937 A.M.C. 36, 40-41 (2d Cir. 1937); United States Cas. Co. v. Taylor, 64 F.2d 521, 524-25, 1933 A.M.C. 1200, 1206-07 (4th Cir.), *cert. denied*, 290 U.S. 639 (1933). See Alaska Packers Ass'n v. Marshall, 95 F.2d 279, 280, 1938 A.M.C. 821, 823-24 (9th Cir. 1938).

state compensation.[76] Additional reliance was placed upon dicta of the Supreme Court,[77] upon the erroneous assumption that mutually exclusive coverage was necessary in order to give effect to section 5,[78] and upon the unarticulated and incorrect assumption that congressional action concerning all injuries on navigable waters automatically meant preemption.[79]

Compared to its use as a defense in claims for federal compensation, the doctrine of "local concern" continued to be relied upon by claimants seeking state compensation. The flood of state appellate review concerning the extent of state power[80] was the natural result of the lower federal courts' interpretation of mutually exclusive coverage.[81] Clearly the purpose of compensation to provide quick and certain relief was frustrated because constitutional questions were constantly raised before appellate courts regardless of whether state or federal compensation had been invoked.

THE SUPREME COURT RECOGNIZES CONCURRENT COVERAGE

It was not until 1941, in *Parker v. Motor Boat Sales, Inc.*,[82] that the Supreme Court first squarely decided the extent to which Con-

[76] Motor Boat Sales, Inc. v. Parker, 116 F.2d 789, 792, 1941 A.M.C. 31, 34 (4th Cir.), *rev'd*, 314 U.S. 244, 1942 A.M.C. 1 (1941); United States Cas. Co. v. Taylor, *supra* note 75, at 524, 1933 A.M.C. at 1205.

[77] Both New Amsterdam Cas. Co. v. McManigal, 87 F.2d 332, 332-33, 1937 A.M.C. 36, 38 (2d Cir. 1937) and United States Cas. Co. v. Taylor, 64 F.2d 521, 523, 1933 A.M.C. 1200, 1204-05 (4th Cir.), *cert. denied*, 290 U.S. 639 (1933) relied upon language in Crowell v. Benson, 285 U.S. 22, 37-38, 1932 A.M.C. 355, 357 (1932) and Nogueira v. New York, N.H. & H.R.R., 281 U.S. 128, 131, 1930 A.M.C. 763, 764-65 (1930) to the effect that federal compensation had two limitations: injury upon navigable waters and a determination that state compensation could not constitutionally be applied. Crowell v. Benson, *supra*, however, decided the constitutionality of the Longshoremen's Act and outlined the "jurisdictional fact" doctrine. See GILMORE & BLACK, ADMIRALTY § 6-47 (1957). Nogueira v. New York, N.H. & H.R.R., *supra*, determined which federal statute provided the proper remedy to the employee of a railroad injured on navigable waters.

[78] See Motor Boat Sales, Inc. v. Parker, 116 F.2d 789, 796, 1941 A.M.C. 31, 41-42 (4th Cir.), *rev'd*, 314 U.S. 244, 1942 A.M.C. 1 (1941).

[79] *Ibid.*

[80] *E.g.*, Martinson v. Industrial Acc. Comm'n, 154 Ore. 423, 60 P.2d 972, 1936 A.M.C. 1566 (1936), *cert. denied*, 300 U.S. 659 (1937); Johnson v. Elliott, 152 Va. 121, 146 S.E. 298 (1929); St. John v. Thompson, 108 Vt. 66, 182 Atl. 196 (1936). See 2 LARSON, WORKMEN'S COMPENSATION LAW § 89.22 (1961) for a collection of such cases.

[81] See Dawson v. Jahncke Drydock, 33 F Supp. 668, 1940 A.M.C. 1130 (E.D. La. 1940) where an injured employee was precluded from obtaining federal compensation by virtue of the fact that the statute of limitations under the Longshoremen's Act had run while state compensation was being invoked unsuccessfully in Dawson v. Jahncke Dry Docks, 18 La. App. 11, 137 So. 376 (1931).

[82] 314 U.S. 244, 1942 A.M.C. 1 (1941).

gress had actually exercised its power in passing the Longshoremen's Act. In *Parker*, a janitor who was employed exclusively on shore had gone along on a test run of an outboard motor on the James River and had drowned when the motor boat capsized. Virginia's compensation statute was unavailable to the widow because the decedent's employer had an insufficient number of employees. Proceeding, however, under the Longshoremen's Act, she surprisingly obtained an award. Sustaining the employer's defense that Virginia constitutionally could have provided compensation because these facts were of "local concern," the Fourth Circuit set aside the award by adhering to the interpretation of section 3(a) that Congress had occupied only the field excluded from state compensation.[83]

The Supreme Court unanimously reversed and reinstated the award in an opinion written by Justice Black that concealed the precise question before the Court. The conclusions subsequently derived from this failure to make a penetrating analysis of the actual holding in *Parker* have led to confusion and bewilderment on the part of courts, counsel, and writers that exists to this day.[84]

Recognizing that the Fourth Circuit had sustained the use of "local concern" to deny federal coverage by holding state compensation could constitutionally be provided,[85] Justice Black declared that this holding could not rest on the ground that the decedent was a non-maritime employee, because he was engaged in a maritime activity at the time of his death.[86] He then noted that the holding must have rested on the theory that the employment, even though maritime and within an area in which Congress could have established exclusive jurisdiction, was nevertheless subject to state regulation until Congress had preempted state coverage.[87] Referring to *Jensen* Justice Black stated such a theory was erroneous because the Constitution limited state power even in the absence of congressional action.[88] He then proceeded to conclude that state compensation could not have applied to these facts even though the constitutional lines were shadowy.[89] However, and this point cannot be overemphasized, Justice Black expressly stated that the Court was not deciding the question of whether or not state compensation could constitutionally apply to these facts:

> What we are called upon to decide is not of constitutional magnitude. For, regardless of whether or not the limitation on the power of

[83] Motor Boat Sales, Inc. v. Parker, 116 F.2d 789, 1941 A.M.C. 31 (4th Cir. 1941).
[84] See GILMORE & BLACK, ADMIRALTY § 6-49, at 347-48 (1957).
[85] Parker v. Motor Boat Sales, Inc., 314 U.S. 244, 246, 1942 A.M.C. 1, 3 (1941).
[86] *Id.* at 247, 1942 A.M.C. at 3.
[87] *Id.* at 247, 1942 A.M.C. at 4.
[88] *Id.* at 247-48, 1942 A.M.C. at 4.
[89] *Id.* at 248, 1942 A.M.C. at 4.

> states set out in the *Jensen* case is to be accepted, it is not doubted that Congress could constitutionally have provided for recovery under a federal statute in this kind of situation. The question is whether Congress has so provided in this statute. The proviso of § 3(a) aside, there would be no difficulty whatever in concluding it has.[90]

This clearly establishes that the only question under consideration was the extent of power exercised by Congress in enacting the Longshoremen's Act. Justice Black then expressly held that Congress had exercised its power so that these facts came within the coverage of the Longshoremen's Act: "While the proviso of § 3(a) appears to be a subtraction from the scope of the Act outlined by Congress, . . it is not a large enough subtraction to place this case outside the coverage which Congress intended to provide."[91]

Throughout his opinion Justice Black did not expressly use the term "local concern," and thus did not further refine the issue as being whether or not a defense predicated upon "local concern" could be asserted to defeat a claim for federal compensation. Nevertheless, Justice Black did indicate that such a defense was unavailable against a claimant seeking federal compensation whose claim under a state act might have raised constitutional questions by stating: "There can be no doubt that the purpose of the Act was to provide for federal compensation in the area beyond the reach of the states. The proviso permitting recovery only where compensation 'may not validly be provided by State law' cannot be read in a manner that would defeat this purpose."[92] Subsequent courts and counsel of compensation claimants have failed to recognize the significance of Justice Black's language.[93] It is indisputable, however, that Justice Black considered "local concern" to be an irrelevant factor in federal compensation proceedings because he forcefully stated that Congress had not accepted the *Jensen* line of demarcation on state power as a limitation on federal coverage:

> An interpretation which would enlarge or contract the effect of the proviso in accordance with whether this Court rejected or reaffirmed the constitutional basis of the *Jensen* and its companion cases cannot be acceptable. The result of such an interpretation would be to subject the scope of protection that Congress wished to provide, to uncertainties that Congress wished to avoid.[94]

---

[90] *Id.* at 248, 1942 A.M.C. at 5.

[91] *Id.* at 249, 1942 A.M.C. at 5.

[92] *Id.* at 249-50, 1942 A.M.C. at 5-6.

[93] See Massachusetts Bonding & Ins. Co. v. Lawson, 149 F.2d 853, 1945 A.M.C. 878 (5th Cir. 1945); Travelers Ins. Co. v. McManigal, 139 F.2d 949, 1944 A.M.C. 377 (4th Cir. 1944). See also GILMORE & BLACK, ADMIRALTY § 6-49, at 348 (1957).

[94] Parker v. Motor Boat Sales, Inc., 314 U.S. 244, 250, 1942 A.M.C. 1, 6 (1941).

Properly analyzed, *Parker* held that Congress had exercised its power so that constitutional adjudications of state power were unnecessary in deciding claims under the Longshoremen's Act because federal coverage had not been restricted to the field beyond constitutionally valid state coverage.

Did denying the use of "local concern" to defeat a claim for federal compensation mean that Congress had exercised its power to the fullest extent and thereby preempted all state coverage? Justice Black neither posed such a question nor clearly directed attention to its presence. However, he declared that state compensation had not been preempted because the Longshoremen's Act denied state coverage only if it would conflict with the Constitution:

> The main impetus for the Act was the need to correct a gap made plain by decisions of this Court. We believe that there is only one interpretation of the proviso in § 3(a) which would accord with the aim of Congress; the field in which a state may not validly provide for compensation must be taken, for the purposes of the Act, as the same field which the *Jensen* line of decision excluded from state compensation laws. Without affirming or rejecting the *constitutional* implications of those cases, we accept them as the measure by which Congress intended to mark the scope of the Act they brought into existence.[95]

Implicit within this interpretation of section 3(a) as a congressional acceptance of constitutional limitations upon state power were two conclusions. First, Congress sanctioned the continued operation of state compensation by inarticulately declaring that such state coverage would not contravene the purpose of the Longshoremen's Act. Second, although federal compensation was the only remedy in the field beyond valid state coverage, the use of different lines to define the extent of federal and state compensation meant there was an area of concurrent coverage despite the purported exclusive liability provision in the Longshoremen's Act.[96]

Since Justice Black had stated in dictum that state compensation could not constitutionally apply to the facts before the Court,[97] subsequent improper analysis led to great uncertainty regarding the continued application of state compensation to injuries on navigable waters.[98] Obviously, few fact situations, if any, could be more local

---

[95] *Ibid.*

[96] 44 Stat. 1426 (1927), 33 U.S.C. § 905 (1964).

[97] Parker v. Motor Boat Sales, Inc., 314 U.S. 244, 248, 1942 A.M.C. 1, 4 (1941).

[98] Standard Dredging Corp. v. Henderson, 57 F Supp. 770, 771-72 (S.D. Ala. 1944), *rev'd on other grounds*, 150 F.2d 78, 1945 A.M.C. 881 (5th Cir. 1945); Standard Dredging Corp. v. Henderson, 150 F.2d 78, 80, 1945 A.M.C. 881, 883 (5th Cir. 1945). See 2 LARSON, WORKMEN'S COMPENSATION LAW § 89.23(b) (1961); GILMORE & BLACK, ADMIRALTY § 6-49, at 347-48 (1957).

than an injury to a janitor who worked exclusively on land save for the single time he went along on a test run of a motor boat. But Justice Black made this statement merely to retain the appearance of mutually exclusive coverage between state and federal compensation while actually interpreting section 3(a) to provide overlapping coverage.[99] If Justice Black had held that section 3(a) provided for no concurrent coverage, the Longshoremen's Act would have automatically applied upon finding state coverage unconstitutional. However, it is clear that not only did he not follow this course, but his opinion was devoid of any reference to, or citation of, the unanimous prior precedent which had interpreted federal and state compensation to be mutually exclusive.[100]

Coupled with his statement regarding the inapplicability of state coverage, Justice Black subtly used the term "subtraction" to compound his concealment of the fact that he was actually holding contrary to mutually exclusive coverage while retaining the appearance of such coverage: "While the proviso of § 3(a) appears to be a subtraction from the scope of the Act outlined by Congress, we believe that, *properly interpreted*, it is not a large enough subtraction to place this case outside the coverage which Congress intended to provide."[101] Subsequently Justice Black interpreted section 3(a) to mean that although Congress had accepted the *Jensen* line of decisions as a limit upon state power, it had extended federal coverage beyond the line fixing the limits of state power. Under such an interpretation, an acceptance by Congress of continued state coverage was a "subtraction" since preemption of state coverage would have been the fullest exercise of congressional power. However, Congress had not expressed a greater "subtraction" because it had failed to limit federal coverage to the field constitutionally excluded from state compensation. Therefore, within the context of what power Congress could have exercised, the phrase "and if recovery may not validly be provided by State law"[102] was definitely a "subtraction." However, from the standpoint of prior precedent which adhered to mutually exclusive coverage,[103] such a "subtraction" was in reality a substantial addition to the scope of coverage provided by federal compensation.

The failure to recognize *Parker* as a decision concerned with the

---

[99] Such a statement may also have been made to preclude the employer from contending that he was not subject to the Longshoremen's Act on the ground he had no employees engaged in maritime employment on navigable waters. See Longshoremen's Act § 2(4), 44 Stat. 1425 (1927), 33 U.S.C. § 902(4) (1964).

[100] See GILMORE & BLACK, ADMIRALTY § 6-49, at 348 (1957).

[101] Parker v. Motor Boat Sales, Inc., 314 U.S. 244, 249, 1942 A.M.C. 1, 5 (1941). (Emphasis added.)

[102] 44 Stat. 1426 (1927), 33 U.S.C. § 903(a) (1964).

[103] Cases cited notes 71-73 *supra*.

construction of a federal statute rather than a determination of state power led to hopeless confusion the following year when, in *Davis v. Department of Labor and Industries*,[104] the Supreme Court created the "twilight zone"[105] while granting recovery of state compensation on facts much less local in nature than those in *Parker*.[106] In *Davis* a structural steelworker, engaged in the dismantling of an intrastate bridge over a navigable river, drowned when he fell or was knocked into the river from the barge on which he was working. His duties at the time of the accident had been to examine the steel after it had been lowered onto the barge and to cut the pieces to proper lengths for purposes of storage. Seeking the benefits of state compensation, his widow proceeded against the employer who had complied only with the state statute which purported to cover all employees engaged in maritime occupations for whom no right or obligation existed under the maritime law.[107] After making the crucial characterization that the decedent's duties were the loading of a vessel on navigable waters, and thus a "longshoreman" directly within the ambit of *Jensen*,[108] the Washington Supreme Court affirmed three lower tribunals and denied recovery on the ground that the state could not constitutionally make a compensation award on these facts.[109] Speaking again through Justice Black, the Supreme Court reversed with only one dissent on the ground that the Constitution was no bar to the recovery of state compensation because these facts came within a "twilight zone."

Since *Davis* was the first Supreme Court decision to allow recovery of state compensation for an employment injury on navigable waters after passage of the Longshoremen's Act, it laid to rest any contention that Congress had abrogated the operation of state compensation for such injuries. This was consistent with the Supreme Court's interpretation of the Longshoremen's Act in *Parker* and was also supported by pre-*Parker* litigation in the state courts.[110] Thus the question pre-

---

[104] 317 U.S. 249, 1942 A.M.C. 1653 (1942).

[105] Davis v. Department of Labor, 317 U.S. 249, 256, 1942 A.M.C. 1653, 1657-58 (1942).

[106] See Travelers Ins. Co. v. McManigal, 139 F.2d 949, 951, 1944 A.M.C. 377, 381 (4th Cir. 1944); GILMORE & BLACK, ADMIRALTY § 6-49, at 349 (1957).

[107] WASH. REV. CODE § 51.12.100 (1961).

[108] "Appellant's claim for pension was rejected on the ground that Davis was, at the time of his accident, engaged in the performance of a maritime service upon navigable waters, the theory being that the state has no jurisdiction over such accidents, and that they are not within the purview of the industrial insurance act. That he was so engaged is hardly debatable." Davis v. Department of Labor, 12 Wash. 2d 349, 351, 121 P.2d 365, 366, 1942 A.M.C. 304, 305 (1942).

[109] "The accident occurred while Davis was working as a stevedore on a vessel in navigable waters. The fact that he may have been employed as a structural steel worker is immaterial." *Id.* at 353-54, 121 P.2d at 367, 1942 A.M.C. at 306.

[110] See cases note 80 *supra*.

sented in *Davis* was the same as that presented by state claims prior to the enactment of the Longshoremen's Act: whether or not the Constitution was a bar to the recovery of state compensation.[111] This contrasts with the radically different question in *Parker* which involved the interpretation of a statute passed by Congress.[112]

While prior to *Davis* "local concern" had evolved as a basis to sustain the application of state compensation to injuries upon navigable waters, *Davis* allowed recovery of state compensation if it came within a "twilight zone."[113] The first question that arises is whether the "twilight zone" was a new concept or merely "local concern" under a new label. Justice Black clearly set the stage for the declaration of a new concept by expressing dissatisfaction with the results of "local concern"

> When a state could and when it could not, grant protection under a compensation act was left as a perplexing problem, for it was held "difficult, if not impossible," to define this boundary with exactness.
>
> [E]mployees such as decedent here occupy that shadowy area within which, at some undefined and undefinable point, state laws can validly provide compensation. This Court has been unable to give any guiding, definite rule to determine the extent of state power in advance of litigation. The determination of particular cases, of which there have been a great many, has become extremely difficult. It is fair to say that a number of cases can be cited both in behalf of and in opposition to recovery here.
>
> The very closeness of the cases cited . has caused much serious confusion.[114]

In order to relieve an injured employee of the undesirable burden of predetermining constitutional questions regarding state coverage over which appellate judges regularly divided, Justice Black purported to obliterate further use of "local concern" by declaring that the application of state compensation was a question of fact that

---

[111] "A line of opinions of this Court, beginning with *Jensen* held that under some circumstances states could, but under others could not, consistently with the Federal Constitution, apply their compensation laws to maritime employees.

[E]mployees such as decedent here, occupy that shadowy area within which, at some undefined and undefinable point, state laws can validly provide compensation." Davis v. Department of Labor, 317 U.S. 249, 252-53, 1942 A.M.C. 1653, 1654-55 (1942).

[112] "What we are called upon to decide is not of constitutional magnitude. Congress could constitutionally have provided for recovery under a federal statute in this kind of situation. The question is whether Congress has so provided in this statute." Parker v. Motor Boat Sales, Inc., 314 U.S. 244, 248, 1942 A.M.C. 1, 5 (1941).

[113] Davis v. Department of Labor, 317 U.S. 249, 256, 1942 A.M.C. 1653, 1657-58 (1942).

[114] *Id.* at 252-54, 1942 A.M.C. at 1654-56.

should be decided immediately rather than a question of constitutional law to be answered by appellate review.

> It must be remembered that under the *Jensen* hypothesis, basic conditions are factual: Does the state law "interfere with the proper harmony and uniformity of" maritime law? Yet, employees are asked to determine with certainty before bringing their actions that factual question over which courts regularly divide among themselves and within their own membership.[115]

Justice Black then proceeded to proclaim the "twilight zone" to justify the determination of this question of fact at the administrative level:

> There is clearly a twilight zone in which the employees must have their rights determined case by case, and in which particular facts and circumstances are vital elements. That zone includes persons such as the decedent who are, as a matter of actual administration, in fact protected under the state compensation act.[116]

In order to insure the greatest number of administrative factual findings in favor of state coverage once state compensation proceedings had been initiated, Justice Black pointed to two propositions that would facilitate such findings. First, the state compensation statute invoked must be presumed to be constitutional as applied.[117] Second, a reasonable characterization of the employee's duties at the time of injury which would support a finding that the employee came within the coverage of the state statute should be accepted at the administrative level. While this second proposition was not expressly set forth by Justice Black, it necessarily followed from the Supreme Court's decision granting state recovery in *Davis* without overruling *Jensen* which had denied state coverage to a railroad employee characterized as a stevedore injured on navigable waters.[118] Therefore, an employee aiding in dismantling an intrastate bridge while piling steel on a barge should not have been characterized by the Washington courts as a stevedore engaged in loading a vessel on navigable waters because it had been an unwarranted factual basis for denying state compensation.[119] The interaction of these two factors results in a conclusion that the only question of law that could arise for state appellate review is whether or not the particular facts would be such that the presumption of constitutionality were unwarranted. Justice Black indicated that an appeal would be futile unless the decision of

---

[115] *Id.* at 254, 1942 A.M.C. at 1656.

[116] *Id.* at 256, 1942 A.M.C. at 1657-58.

[117] "Faced with this factual problem we must give great—indeed, presumptive—weight to the state statutes themselves." *Id.* at 256, 1942 A.M.C. at 1658.

[118] "The work of a stevedore in which the deceased was engaging " Southern Pac. Co. v. Jensen, 244 U.S. 205, 217 (1917).

[119] See text in notes 108, 109 *supra.*

the administrative authority were obviously erroneous. Clearly this would lead to virtual finality at the administrative level:

> Under all the circumstances of this case, we will rely on the presumption of constitutionality in favor of this state enactment; for any contrary decision results in our holding the Washington act unconstitutional as applied to this petitioner. A conclusion of unconstitutionality of a state statute cannot be rested on so hazardous a factual foundation here, any more than in the other cases cited.
>
> Giving the full weight to the presumption, and resolving all doubts in favor of the Act, we hold that the Constitution is no obstacle to the petitioner's recovery.[120]

Soon after *Davis* two per curiam opinions of the Supreme Court illustrated the proposition that a reasonable characterization of the employee's duties at the time of his injury should not be rejected if it would preclude state coverage. Both in *Moores's Case*[121] and *Baskin v. Industrial Acc. Comm'n*[122] a shipyard worker primarily employed on land had been injured on navigable waters while aboard a vessel being repaired. Classified as a rigger rather than a carpenter, Moores was directing other workers transferring materials from shore to the vessel at the time of his injury.[123] Baskin also was not a carpenter. At the time of his injury he was engaged as a materialman helping carry planks from one hold to another.[124] Thus, although neither employee was actually a ship repairman per se at the time of his injury, both were engaged in the performance of their employers' maritime contracts to repair a vessel. Recognizing that ship repairmen were constitutionally precluded from state compensation according to prior precedent,[125] the Massachusetts court in *Moores's* nevertheless sustained state coverage by heavily relying upon *Davis*.[126] On certiorari to the Supreme Court the decision was affirmed per curiam with a citation to *Davis*.[127] In *Baskin*, however, a California appellate court summarily rejected the employee's contention that he was not a carpenter on the ground that as a materialman "he was just as much engaged

[120] Davis v. Department of Labor, 317 U.S. 249, 258, 1942 A.M.C. 1653, 1659 (1942).

[121] 323 Mass. 462, 80 N.E.2d 478, 1948 A.M.C. 1862, *aff'd per curiam sub nom.* Bethlehem Steel Co. v. Moores, 335 U.S. 874 (1948).

[122] 89 Cal. App. 2d 632, 201 P.2d 549 (1949), *rev'd per curiam*, 338 U.S. 854 (1949).

[123] Moores's Case, 323 Mass. 162, 164, 80 N.E.2d 478, 479, 1948 A.M.C. 1862, 1863 (1948).

[124] Baskin v. Industrial Acc. Comm'n, 89 Cal. App. 2d 632, 201 P.2d 549, 550 (1949).

[125] Moores's Case, 323 Mass. 162, 165-66, 80 N.E.2d 478, 479-80, 1948 A.M.C. 1862, 1863-64 (1948).

[126] *Id.* at 166-68, 80 N.E.2d at 480-81, 1948 A.M.C. at 1864-66 (1948).

[127] Bethlehem Steel Co. v. Moores, 335 U.S. 874 (1948) (per curiam).

in the performance of his employer's maritime contract as was the joiner who did the carpentry, albeit of humbler station."[128] Following the denial of state compensation on the ground that ship repairmen could not be in the "twilight zone" because prior precedent was clear,[129] the Supreme Court, on granting certiorari, vacated and remanded per curiam with citations to *Davis* and *Moores's*.[130]

The mode of disposition by the Supreme Court in *Moores's* and *Baskin* was very unsatisfactory because it led to erroneous conclusions, especially since an overly broad reading of these two per curiam decisions made it appear that state courts could disregard prior precedent concerning constitutional limitations upon state power.[131] Furthermore, the confusion generated by improper analysis of Justice Black's opinions in *Parker* and *Davis* was increased rather than clarified.[132] Close scrutiny, however, of the facts in *Moores's* and *Baskin* makes it clear that the only relevant factual distinction between these two cases and *Davis* is that the employer's contract was maritime in the former and non-maritime in the latter.[133] Therefore, *Moores's* and *Baskin* merely illustrate that the Supreme Court abdicated its judicial duty to provide an intelligible guideline by failing to articulate what was implicit in *Davis:* conceding prior precedent denying state coverage *and* the maritime nature of the employer's contract, a reasonable characterization of the employee's duties at the time of injury which

---

[128] Baskin v. Industrial Acc. Comm'n, 89 Cal. App. 2d 632, 634, 201 P.2d 549, 550 (1949).

[129] *Id.* at 637-38, 201 P.2d at 553.

[130] Baskin v. Industrial Acc. Comm'n, 338 U.S. 854 (1949) (per curiam). On remand the California court properly directed the state administrative authority to take jurisdiction. Baskin v. Industrial Acc. Comm'n, 97 Cal. App. 2d 257, 217 P.2d 733 (1950), *aff'd per curiam sub nom.* Kaiser Co. v. Baskin, 340 U.S. 886 (1950).

[131] 2 LARSON, WORKMEN'S COMPENSATION LAW § 89.25 (1961). Such a conclusion led to decisions that longshoremen injured upon navigable waters were within the coverage of the Louisiana compensation statute. Richard v. Lake Charles Stevedores, Inc., 95 So. 2d 830, 1957 A.M.C. 2246 (La. Ct. App. 1957), *cert. denied,* 355 U.S. 952 (1958); Sullivan v. Travelers Ins. Co., 95 So. 2d 834, 1957 A.M.C. 2252 (La. Ct. App. 1957). See Noah v. Liberty Mut. Ins. Co., 265 F.2d 547, 1959 A.M.C. 573, *rev'd on rehearing,* 267 F.2d 218, 1959 A.M.C. 2047 (5th Cir. 1959) where a federal appellate court initially held a longshoreman injured on navigable waters to be within the Louisiana statute before promptly reversing itself.

[132] See De Bardeleben Coal Corp. v. Henderson, 142 F.2d 481, 1944 A.M.C. 773 (5th Cir. 1944); Travelers Ins. Co. v. McMangal, 139 F.2d 949, 1944 A.M.C. 377 (4th Cir. 1944). For a later discussion that unsuccessfully attempted to reconcile *Parker* and *Davis,* see Judge Brown's painstaking review of the authorities in Travelers Ins. Co. v. Calbeck, 293 F.2d 52, 1961 A.M.C. 2008 (5th Cir. 1961), *rev'd,* 370 U.S. 114, 1962 A.M.C. 1413 (1962).

[133] While a contract calling for repairs to an existing vessel comes within the contract jurisdiction of admiralty and thus is a maritime contract, a contract for dismantling an intrastate bridge would not come within the contract jurisdiction of admiralty.

would support state coverage should be accepted at the administrative level.

Davis was a landmark decision: it created the judicial expedient of a question of fact to be decided with certainty at the administrative level in order to validate recovery of state compensation in cases where the facts previously would have necessitated the resolution of constitutional questions as a matter of law It may be asked, however, why the Supreme Court chose such an inarticulate concept as the "twilight zone" as a label for this guideline. Certainly the desire to effectuate the purpose of workmen's compensation to provide quick and certain relief did not necessitate such a label. *Parker* held that Congress had rejected the *Jensen* line of demarcation as a limitation upon federal coverage which meant that a state administrative ruling adverse to the claimant, even if erroneous, did not deprive the injured employee of all compensation. He could still invoke federal compensation with certainty without having to resort to review of the administrative finding in the state appellate courts.

The immediate motivation behind Justice Black's "twilight zone" in *Davis* was the necessity of retaining the facade of mutually exclusive coverage between federal and state compensation. Justice Black was disturbed by the fact that the employer had complied only with the state statute. Unless he made it appear that the state compensation statute was the only remedy, the employer would not only lose the value of his contributions under the state statute, but also would be subject to the provisions of the Longshoremen's Act and the consequences of non-compliance.[134] Nevertheless, Justice Black did indicate that federal compensation was also available if it had been invoked rather than the state statute:

> Not only does the state act in the instant case appear to cover this employee, aside from the constitutional consideration, but no conflicting process of administration is apparent. The federal authorities have taken no action under the Longshoremen's Act, and it does not appear that the employer has either made the special payments required or controverted payment in the manner prescribed in the Act.[135]

Justice Black expressed the majority position in terms of a "twilight zone" in order to avoid confronting the issue of concurrent coverage that had now been raised by the successive holdings in *Parker* and *Davis*.

The fact that every member of the Supreme Court recognized that there was an area of concurrent coverage is emphasized by ref-

[134] Davis v. Department of Labor, 317 U.S. 249, 255, 1942 A.M.C. 1653, 1656-57 (1942).

[135] *Id.* at 258, 1942 A.M.C. at 1659.

erence to Chief Justice Stone's dissent, which was based on the ground that the majority's opinion had made it clear that there was in fact an overlap between federal and state coverage:

> The Court's opinion in the present case seems to proceed upon the assumption that if petitioner had filed a claim under the federal act, and the federal commissioner had awarded compensation, we would sustain his ruling, although the Court now holds that the state authorities erroneously concluded they were without constitutional power to make the award. Indeed, after our decision in *Parker* petitioner's right of recovery under the federal act can hardly be doubted [136]

Concurring with the majority, Jusice Frankfurter provided further support for the proposition that the entire Court was aware of an area of concurrent coverage: "Theoretic illogic is inevitable so long as the employee in a situation like the present is permitted to recover either under the federal act or under a state statute That is the practical result, whether it be reached by the Court's path or that apparently left open under the Chief Justice's views."[137]

Although Justice Frankfurter recognized that the practical result of *Parker* and *Davis* was an area of concurrent coverage, what did he mean by "theoretic illogic"? Certainly the interpretation of section 3(a) in *Parker* permitted federal coverage in the field where state compensation was constitutional. However, section 5 of the Longshoremen's Act appeared to impose exclusive liability upon the employer once federal compensation was available. Therefore, since all state compensation statutes imposed exclusive liability upon the employer once they were applicable, theoretically there appeared to be mutually exclusive coverage. While Justice Frankfurter yielded to the purpose of compensation to provide relief at the expense of "theoretic illogic", Chief Justice Stone refused to yield from apparent theoretic consistency by condemning the majority's construction of an area of overlap by virtue of a "twilight zone"

> Congress by the enactment of the Longshoremen's and Harbor Workers' Act has left no room for an overlapping dual system I cannot say that this section [5] does not mean what it says. If there is liability under the federal act, that liability is exclusive. It follows that in any case in which compensation might have been awarded under the federal act, a recovery under state law is in plain derogation of the terms of the federal statute Congress has made it our duty, before we sanction a recovery under state law, to ascertain that an award under the federal act can not be had.[138]

---

[136] *Id.* at 260, 1942 A.M.C. at 1661.
[137] *Id.* at 259, 1942 A.M.C. at 1660.
[138] *Id.* at 261, 1942 A.M.C. at 1661-62.

What Chief Justice Stone, Justice Frankfurter, and apparently the entire Court failed to recognize was that Congress had left room for an overlapping dual system consistent with the interpretation of section 3(a) in *Parker* because section 5 was silent on whether or not the employer's liability was to be exclusive of any applicable state compensation legislation. More specifically, since the Longshoremen's Act provided federal coverage beyond the line fixing the limits of state power without preempting state coverage, the apparent conclusiveness of section 5 never existed because the unused choice of law test declared by Justice McReynolds in *Jensen*—does state legislation contravene the essential purpose expressed by an act of Congress?—had come to the forefront with the enactment of a federal compensation statute.

The use of the term "twilight zone" by the Supreme Court in order to evade the issue of concurrent coverage constituted an abdication of its judicial duty to provide comprehensible guidelines to compensation claimants. Not only did the "twilight zone" obscure the true nature of the holdings in *Parker* and *Davis*, but it stimulated appellate review of its limits with the result that new uncertainty was introduced into the administration of workmen's compensation.[139]

There were other failures in the judicial process that greatly contributed to the declaration of a "twilight zone" in *Davis*, as well as the mystic nature of the opinion in *Parker*, which concealed the issue of concurrent coverage. The erroneous reliance by counsel upon prior precedent and section 5 has already been discussed. However, Justice Black also assumed that practical considerations dictated that there appear to be no overlap of coverage.[140] Yet, as a practical matter the employer would not be burdened if the employee could recover either federal or state compensation so long as double recovery was denied. Certainly the idea of requiring an employer to carry insurance under both state and federal compensation schemes in order to escape all other liability for damages at law or in admiralty appears at first glance to be an onerous burden as well as an unnecessary duplication of expenses. However, it is elementary that one insurance carrier, by utilizing allocation of costs, could write a comprehensive policy that would cover an employer under both statutes for approximately the same cost.[141]

---

[139] See, *e.g.*, Noah v. Liberty Mut. Ins. Co., 265 F.2d 547, 1959 A.M.C. 573, *rev'd on rehearing*, 267 F.2d 218, 1959 A.M.C. 2047 (5th Cir. 1957); Valley Towing Co. v. Allen, 236 Miss. 51, 109 So. 2d 538 (1959). See Rodes, *Workmen's Compensation For Maritime Employees: Obscurity In The Twilight Zone*, 68 HARV L. REV. 637 (1955).

[140] Davis v. Department of Labor, 317 U.S. 249, 255, 1942 A.M.C. 1653, 1657 (1942).

[141] In fact, such a practice prevails today. See Gardner, *Remedies For Personal*

Proper analysis of the Longshoremen's Act and proper presentation of the issue in *Davis* probably would have prevented the "twilight zone" from coming into existence. Conceding that federal compensation was available, counsel could have formulated the issue as being whether or not the recovery of state compensation would contravene the essential purpose of the Longshoremen's Act. Since its purpose had been to provide a remedy to those precluded from state compensation, this purpose obviously was not contravened if compensation was constitutionally available under state legislation. Clearly this route of normal statutory interpretation, consistent with the decisions rendered, would have been much more preferable than the concealment in *Parker* and the judicial legedermain in *Davis*.

Although section 5 was silent on the question of an employer being liable for state compensation even though federal compensation was available, it did expressly state that the employer would not be liable for damages at law if federal compensation was provided.[142] Since concurrent coverage had inarticulately been recognized, did this mean that an employer as defined in section 2(4) could comply solely with the Longshoremen's Act by foregoing compliance with state compensation legislation and thereby force an election of federal compensation upon any of his employees injured on navigable waters? Relying again on the "twilight zone" in *Hahn v. Ross Island Sand & Gravel Co.*,[143] the Supreme Court impliedly answered that such an employer did not have this prerogative.

In *Hahn* the employer had waived coverage of state compensation and had complied only with the Longshoremen's Act. An employee injured during dredging operations on navigable waters spurned federal compensation and initiated a negligence suit for damages in the state courts, which was authorized by the Oregon compensation statute if the employer failed to comply with its compensation provisions.[144] Characterizing the employee as engaged in loading a vessel on navigable waters and thus not within state coverage, the state court dismissed on the ground that the Longshoremen's Act provided the only remedy [145] In dictum, however, the state court had rejected the

Injuries To Seamen, Railroadmen, and Longshoremen, 71 HARV. L. REV. 438, 450 n.34 (1958); Note, 50 CALIF. L. REV. 342, 347 (1962).

For an analogous situation prorating the cost of compensation under the same Washington statute as that involved in *Davis*, see Puget Sound Bridge & Dredging Co. v. Department of Labor, 185 Wash. 349, 54 P.2d 1003 (1936).

[142] 44 Stat. 1426 (1927), 33 U.S.C. § 905 (1964).

[143] 358 U.S. 272, 1959 A.M.C. 570 (1959).

[144] ORE. REV. STAT. § 656.020 (1965).

[145] "We think this is a case to which the Longshoremen's and Harbor Workers' Act clearly applies, and that compensation under it is the plaintiff's sole remedy for his injury. [After discussing decisions sustaining federal compensation] The case here is even stronger, for, at the time of his injury, the plaintiff was engaged in loading

employee's contention that if the state compensation statute could apply, it should apply in toto.[146]

Holding that the state could have constitutionally provided compensation because the employee was within the "twilight zone,"[147] and the state had done so but for the employer's non-compliance,[148] the Supreme Court held that *neither* the Constitution *nor* the Longshoremen's Act precluded the employee from maintaining whatever remedy was available to him under the state compensation statute.[149] By stating that the employee came within the "twilight zone," the Supreme Court again had esoterically expressed dissatisfaction with a lower court's characterization of an employee. Therefore, since a reasonable characterization of the employee's duties at the time of his injury brought him within the state compensation statute, nothing in the Constitution precluded coverage. But the state compensation statute permitted suits for damages against the employer if he failed to comply with the statute. Furthermore, the employee had asserted in the state court that the entire statute should apply if state compensation was available.[150] As had become its custom the Supreme Court did not phrase such an issue. The contention of the employee was considered, however, because the Supreme Court expressly held that nothing in the Constitution *or* the Longshoremen's Act precluded the employee from maintaining his negligence suit for damages.

---

a barge. The loading of a vessel has a direct relation to commerce and navigation and is not a matter of local concern." Hahn v. Ross Island Sand & Gravel Co., 214 Ore. 1, 21, 320 P.2d 668, 677, 1958 A.M.C. 1364, 1377-78 (1958).

146 "In our view, the 'twilight zone' was a contrivance for discouraging jurisdictional disputes as between state and federal compensation laws and not as between the Federal Compensation Law and the right to bring an action for damages under state law. [I]t is urged by counsel for the plaintiff that, since the Oregon Workmen's Compensation Act provides for an action against an employer who elects not to come under the Act in which the common-law defenses are not available to the defendant, the Act 'would apply in toto.' We are not persuaded that such a course would accord with the intent of Congress. Nor do we find anything in the Davis case which supports it." *Id.* at 19, 320 P.2d at 676-77, 1958 A.M.C. at 1376-77.

147 Hahn v. Ross Island Sand & Gravel Co., 358 U.S. 272, 273, 1959 A.M.C. 570, 571 (1959). Since the "twilight zone" ameliorated the difficulties of overcoming the constitutional limitations of *Jensen*, the fact that the Supreme Court considered the employee within the "twilight zone" eliminated any constitutional objections that he might otherwise have faced. In fact, the state court had implied the employee was precluded from state coverage by its characterization of the employee's duties as loading a vessel on navigable waters. Text and authority in note 145 *supra*. Once constitutional objections to the employee's suit for damages were removed, the only remaining obstacle was the Longshoremen's Act.

148 *Id.* at 273, 1959 A.M.C. at 571.

149 "Since this case is within the 'twilight zone,' it follows that nothing in the Longshoremen's Act or the United States Constitution prevents recovery." *Id.* at 273, 1959 A.M.C. at 571 (1959).

150 See note 146 *supra*.

Properly interpreted, the precise question in *Hahn* was whether or not the compensation legislation of Oregon contravened the essential purpose of the Longshoremen's Act. Since the purpose of federal compensation was not to supplant state compensation legislation, the decision in *Hahn* may be justified on the ground that an employee should not be deprived of any remedy provided by valid state compensation legislation.

While *Davis* established that an employer could be liable under either federal or state compensation for the same injury, *Hahn* made it clear that an employer as defined in section 2(4) would have to comply with both state compensation legislation and the Longshoremen's Act in order to immunize himself from all other liability. The only major problem that remained was whether the employee injured within the area of overlap on navigable waters could invoke both the federal and state compensation statutes and thereby obtain double recovery On this question the Supreme Court's decision in 1962 in *Calbeck v. Travelers Ins. Co.*[151] is significant.

In *Calbeck* two employees had sustained injuries upon navigable waters while engaged in the construction of launched but uncompleted vessels. Despite the fact that under the *Jensen* line of decisions this type of injury was clearly within the constitutional power of a state to provide compensation,[152] the employees initiated federal compensation proceedings. After obtaining awards at the administrative level, the Fifth Circuit adhered to mutually exclusive coverage and set aside the awards on the ground that there was no twilight where prior precedent was clear.[153] The Supreme Court, however, reversed[154] and held that the Longshoremen's Act extends to employment injuries on navigable waters even though a state may also constitutionally provide compensation.[155] Therefore, *Calbeck* merely clarified what had been broadly established in *Parker* twenty years before: the Longshoremen's Act is applicable even if state coverage is clearly available under the *Jensen* line of decisions.

[151] 370 U.S. 114, 1962 A.M.C. 1413 (1962).

[152] *E.g.*, Grant Smith-Porter Ship Co. v. Rohde, 257 U.S. 469 (1922).

[153] Travelers Ins. Co. v. Calbeck, 293 F.2d 52, 1961 A.M.C. 2008 (5th Cir. 1961).

[154] Calbeck v. Travelers Ins. Co., 370 U.S. 114, 1962 A.M.C. 1413 (1962).

[155] "The Court of Appeals' interpretation of § 3(a) would, if correct, have the effect of excepting from the Act's coverage not only the injuries suffered by employees while engaged in ship construction but also any other injuries—even though incurred on navigable waters and so within the reach of Congress—for which a state law could, constitutionally, provide compensation. But the Court of Appeals' interpretation is incorrect. The history of the Act, and of § 3(a) in particular, contravenes it; and our decisions construing § 3(a) have rejected it. Our conclusion is that Congress invoked its constitutional power so as to provide compensation for all injuries sustained by employees on navigable waters whether or not a particular injury might also have been within the constitutional reach of a state workmen's compensation law." *Id.* at 116-17, 1962 A.M.C. at 1415-16. (Footnote omitted.)

In *Calbeck* one of the two employees had accepted voluntary state compensation benefits and did not initiate his claim under the Longshoremen's Act until he had received substantial state benefits.[156] Recognizing that the Longshoremen's Act also provided compensation coverage, the Supreme Court squarely confronted the question of whether the employee was entitled to double recovery.[157] Holding that the acceptance of state compensation without proceeding to an award did not estop a claim under the Longshoremen's Act,[158] the Supreme Court held that the federal compensation award had to be credited with the amount of benefits obtained under state compensation.[159] Therefore, *Calbeck* stands for the proposition that double recovery is not permissible when the employee is injured upon navigable waters in an area of concurrent compensation coverage. Even though the Supreme Court still has not been directed to the fact that section 5 does not expressly exclude state compensation liability on the part of the employer, it appears as though the tenor of *Calbeck* will lead to the same conclusion.

While this analysis of Supreme Court decisions arrives at definite conclusions regarding the significance of *Parker*, *Davis*, *Hahn*, and *Calbeck*, it is clear that the state and lower federal courts did not view these cases with such certainty, and much confusion and bewilderment prevailed until *Calbeck*. In fact, *Calbeck* has not completely dispelled all confusion,[160] especially since it has been contended that it overturned thirty-five years of precedent without any justification other than a few excerpts of legislative intent revealed in the majority's opinion.[161] Consequently, the state and lower federal court decisions will be reviewed only to the extent that they outline the present seaward limits of state compensation, the present landward limits of

---

[156] *Id.* at 131, 1962 A.M.C. at 1426. See Avondale Shipyards, Inc. v. Donovan, 293 F.2d 51, 52, 1961 A.M.C. 2006, 2007-08 (1961).

[157] Calbeck v. Travelers Ins. Co., 370 U.S. 114, 131, 1962 A.M.C. 1413, 1426 (1962).

[158] *Ibid.*

[159] *Ibid.*

[160] *Compare* Gainsburgh & Fallon, *Calbeck v. Travelers Insurance Company: The Twilight's Last Gleaming?*, 37 TUL. L. REV. 79, 87-88 (1962) (mutually exclusive coverage because state compensation has been preempted), *with* Note, 15 S.C.L. REV. 982, 986-87 (1963) (*Calbeck* permits co-extensive concurrent coverage). See the dissenting opinion of Mr. Justice Stewart in Calbeck v. Travelers Ins. Co., 370 U.S. 114, 132, 1962 A.M.C. 1413, 1427 (1962) which adhered to the erroneous conception that the "twilight zone" was a device to retain segregation between mutually exclusive compensation schemes and concluded that the interpretation of section 3(a) by the majority had eliminated the "twilight zone."

[161] Calbeck v. Travelers Ins. Co., 370 U.S. 114, 138, 1962 A.M.C. 1413, 1431 (1962) (dissenting opinion); Note, 1963 DUKE L.J. 327, 334 (1963); Note, 15 S.C.L. REV. 982, 986 (1963); Note, 10 U.C.L.A.L. REV. 1225, 1228-29 (1963).

federal compensation, and the problem of election of remedies which results from concurrent coverage.

THE EXTENT OF CONCURRENT COVERAGE

The constitutional power of a state to provide compensation is scrutinized only when the employment injury occurs within the tort jurisdiction of admiralty.[162] The waters included within such jurisdiction are the navigable waters of the United States as well as the high seas beyond the traditional three mile territorial limit.[163] It is clear that state compensation legislation which purports to operate extraterritorially may provide relief for injuries upon the high seas when within constitutional limits.[164] However, since the Longshoremen's Act is restricted by its terms to the navigable waters of the United States,[165] the physical area of concurrent coverage within the tort jurisdiction of admiralty between federal and state compensation is restricted to injuries or deaths upon such waters.[166]

Injuries on gangplanks temporarily connecting land with vessels are within the traditional tort jurisdiction of admiralty.[167] Following this principle injuries on gangplanks,[168] skids,[169] and other like structures[170] have been held to be compensable under the Longshoremen's Act as being injuries upon navigable waters. However, injuries on

---

[162] *E.g.*, Industrial Comm'n v. Nordenholt Corp., 259 U.S. 263 (1922).

[163] GILMORE & BLACK, ADMIRALTY § 1-11, at 28 (1957).

[164] King v. Pan American World Airways, 270 F.2d 355, 1959 A.M.C. 2174 (9th Cir. 1959), *affirming* 166 F Supp. 136 (N.D. Cal. 1958), *cert. denied*, 362 U.S. 928 (1960); Rice v. Uwharrie Council Boy Scouts of America, 263 N.C. 204, 139 S.E.2d 223 (1964). *But see* Szumski v. Dale Boat Yards, Inc., 90 N.J. Super. 86, 216 A.2d 256 (App. Div. 1966).

[165] 44 Stat. 1425 (1927), 33 U.S.C. § 902(9) (1964); 44 Stat. 1426 (1927), 33 U.S.C. § 903(a) (1964).

[166] If the conclusions drawn herein are valid, it could be contended that the Longshoremen's Act provides compensation for injuries on the high seas if state compensation would not be constitutional. Such a contention, however, appears to be without basis from the standpoint of congressional intent. First, the scope of the Longshoremen's Act is expressly restricted to the territorial navigable waters of the United States. Statutes cited note 165 *supra*. Second, Congress enacted the Outer Continental Shelf Lands Act, 67 Stat. 463 (1953), 43 U.S.C. § 1333(c) (1964), which incorporates the provisions of the Longshoremen's Act to provide compensation for injuries sustained in oil drilling operations on the high seas beyond the territorial waters of the United States.

[167] The Admiral Peoples, 295 U.S. 649, 1935 A.M.C. 875 (1935). See Jensen v. Southern Pac. Co., 244 U.S. 205 (1917).

[168] West v. Erie R.R., 163 F Supp. 879, 1959 A.M.C. 798 (S.D.N.Y. 1958); Caldaro v. Baltimore & O.R.R., 166 F Supp. 833 (E.D.N.Y. 1956).

[169] Michigan Mut. Liab. Co. v. Arrien, 344 F.2d 640, 1965 A.M.C. 805 (2d Cir. 1965).

[170] Byrd v. New York Cent. Sys., 6 N.J. Super. 568, 70 A.2d 97 (1949).

docks,[171] piers,[172] and any other like structures[173] affixed permanently to shore but extending over navigable waters are merely extensions of land and not within the tort jurisdiction of admiralty Remedies for injuries upon such structures have always been provided by state law rather than the general maritime law [174] Decisions under the Longshoremen's Act have adhered to this principle by denying compensation for injuries sustained on piers,[175] docks,[176] and wharves,[177] as not being injuries upon navigable waters.

Until 1948 there was no question that "navigable waters" under the Longshoremen's Act was equated with the traditional test to determine the tort jurisdiction of admiralty [178] In that year Congress enacted the Extension of Admiralty Jurisdiction Act[179] which extended the traditional tort jurisdiction of admiralty to include all injuries caused by a vessel notwithstanding that such injury is consummated on land.[180] The question then arose whether or not the coverage of the Longshoremen's Act had likewise been impliedly expanded to include injuries occurring upon land. Since the Extension Act neither expressly amended nor referred to the Longshoremen's Act, the cases have unanimously held that there has been no amendment of the Longshoremen's Act by implication.[181] Such decisions have properly been decided in light of the fact that the existence of state compensation for injuries upon land renders unnecessary any judicial extension of federal coverage.

Generally, the question whether or not an injury has occurred upon

---

[171] Industrial Comm'n v. Nordenholt Corp., 259 U.S. 263 (1922).

[172] *E.g.*, Swanson v. Marra Bros., 328 U.S. 1, 1946 A.M.C. 715 (1946).

[173] T. Smith & Son v. Taylor, 276 U.S. 179, 1928 A.M.C. 447 (1928).

[174] *E.g.*, Industrial Comm'n v. Nordenholt Corp., 259 U.S. 263 (1922).

[175] Houser v. O'Leary, 253 F Supp. 417 (D. Ore. 1966); East v. Oosting, 245 F Supp. 51, 1965 A.M.C. 2231 (E.D. Va. 1965); Johnson v. Traynor, 243 F Supp. 184, 1965 A.M.C. 1825 (D. Md. 1965).

[176] Johnston v. Marshall, 128 F.2d 13 (9th Cir.), *cert. denied*, 317 U.S. 629 (1942).

[177] Stansbury v. Atlantic & Gulf Stevedores, Inc., 159 So. 2d 728 (La. Ct. App. 1964).

[178] *E.g.*, Swanson v. Marra Bros., 328 U.S. 1, 1946 A.M.C. 715 (1946).

[179] 62 Stat. 496 (1948), 46 U.S.C. § 740 (1964).

[180] Gutierrez v. Waterman S.S. Corp., 373 U.S. 206, 209, 1963 A.M.C. 1649, 1652 (1963).

[181] Houser v. O'Leary, 253 F Supp. 417 (D. Ore. 1966); East v. Oosting, 245 F Supp. 51, 1965 A.M.C. 2231 (E.D. Va. 1965); Johnson v. Traynor, 243 F Supp. 184, 1965 A.M.C. 1825 (D. Md. 1965); Atlantic Stevedoring Co. v. O'Keeffe, 220 F Supp. 881, 1963 A.M.C. 2459 (S.D. Ga. 1963), *rev'd on other grounds*, 354 F.2d 48 (5th Cir. 1965); Revel v. American Export Lines, 162 F Supp. 279, 1959 A.M.C. 531 (E.D. Va. 1958), *aff'd*, 266 F.2d 82, 1959 A.M.C. 1073 (4th Cir. 1959). *But see* Michigan Mut. Liab. Co. v. Arnen, 233 F Supp. 496, 1964 A.M.C. 2626 (S.D.N.Y. 1964), *aff'd*, 344 F.2d 640, 1965 A.M.C. 805 (2d Cir. 1965).

navigable waters is determined without difficulty However, problems arise when the place of the initial act or omission, the place where the force initially takes effect upon the employee, and the place of precipitation after the force has fully exerted itself do not all coincide on navigable waters or shore, but are divided between each. Giving effect to the purpose of compensation, decisions under the Longshoremen's Act have sustained the recovery of federal compensation where navigable waters were either the place where the force initially took effect upon the employee[182] or the place of precipitation when there was no identifiable force other than accidental causes.[183] However, if finding an injury upon navigable waters would preclude an action for damages at law, courts have shown a tendency to allow the action for damages if the place where the force took effect upon the employee was upon shore, even though the employee was subsequently precipitated into navigable waters.[184]

The Longshoremen's Act also provides recovery for injuries or deaths on any dry dock of the United States.[185] Since a dry dock is constructed above or adjacent to navigable waters,[186] such structures present no problem of jurisdiction under the Longshoremen's Act.[187] However, the cases have considered whether or not a marine railway constitutes a dry dock within the meaning of the Longshoremen's Act. Functionally both are the same because a marine railway is also used for the repair of existing vessels.[188] It differs from a dry dock, however, in that the vessel is drawn completely out of the water and up onto the land before repairs are started.[189] Clearly, injuries sustained in such repairs are within the coverage of state compensation because the injury occurs on land, even if the employee is actually repairing the

[182] *Cf.*, Minnie v. Port Huron Terminal Co., 295 U.S. 647, 1935 A.M.C. 879 (1935); Mach v. Pennsylvania R.R., 198 F Supp. 469 (W.D. Pa. 1958). *But see* O'Keeffe v. Atlantic Stevedoring Co., 354 F.2d 48 (5th Cir. 1965).

[183] Interlake S.S. Co. v. Nielsen, 338 F.2d 879, 1965 A.M.C. 1542 (6th Cir. 1964), *cert. denied*, 381 U.S. 934 (1965); Marine Stevedoring Corp. v. Oosting, 238 F Supp. 78, 1965 A.M.C. 1219 (E.D. Va. 1965). *Cf.*, O'Keeffe v. Atlantic Stevedoring Co., 354 F.2d 48 (5th Cir. 1965).

[184] Stott v. Thompson, 294 Ill. App. 450, 14 N.E.2d 246, *cert. denied*, 305 U.S. 639 (1938). See Murphy v. Boston & M.R.R., 319 Mass. 413, 65 N.E.2d 923 (1946). *Cf.*, Baldwin v. Linde-Griffith Constr. Co., 115 N.J.L. 608, 181 Atl. 35 (1935).

[185] 44 Stat. 1426 (1927), 33 U.S.C. § 903(a) (1964).

[186] *E.g.*, O'Leary v. Puget Sound Bridge & Dry Dock Co., 349 F.2d 571, 1965 A.M.C. 2042 (9th Cir. 1965); Maryland Cas. Co. v. Lawson, 101 F.2d 732, 733, 1939 A.M.C. 129 (5th Cir. 1939).

[187] The Steamship Jefferson, 215 U.S. 130 (1909).

[188] *E.g.*, O'Leary v. Puget Sound Bridge & Dry Dock Co., 349 F.2d 571, 1965 A.M.C. 2042 (9th Cir. 1965); Maryland Cas. Co. v. Lawson, 101 F.2d 732, 1939 A.M.C. 129 (5th Cir. 1939).

[189] *Ibid.*

ship and thus engaged in maritime employment.[190] The question that has been raised, however, is whether the Longshoremen's Act provides compensation for such injuries even though not on navigable waters. The decisions have held federal compensation is available where the marine railway is being used for repairs to an existing vessel[191] rather than the construction of a new vessel.[192]

In conclusion, the physical area of potential concurrent compensation coverage includes employment injuries or deaths upon the navigable waters of the United States, or any "drydock" as it has judicially been defined under the Longshoremen's Act.

Once an employee other than a "seaman"[193] has sustained injury in

---

[190] See Industrial Comm'n v. Nordenholt Corp., 259 U.S. 263 (1922). *Cf.*, Rohlfs v. Department of Labor & Indus., 190 Wash. 566, 69 P.2d 817, 1937 A.M.C. 1026 (1937).

[191] Avondale Marine Ways, Inc. v. Henderson, 346 U.S. 366, 1953 A.M.C. 1990, *affirming per curiam* 201 F.2d 437, 1953 A.M.C. 432 (5th Cir. 1953); Holland v. Harrison Bros. Dry Dock & Repair Yard, Inc., 306 F.2d 369 (5th Cir. 1962); Maryland Cas. Co. v. Lawson, 101 F.2d 732, 1939 A.M.C. 129 (5th Cir. 1939); Continental Cas. Co. v. Lawson, 64 F.2d 802, 1933 A.M.C. 794 (5th Cir. 1933). *Contra*, Norton v. Vesta Coal Co., 63 F.2d 165, 1933 A.M.C. 425 (3d Cir. 1933). See Norton v. Vesta Coal Co., *supra* at 166, 1933 A.M.C. at 427 (dissenting opinion).

[192] *E.g.*, O'Leary v. Puget Sound Bridge & Dry Dock Co., 349 F.2d 571, 1965 A.M.C. 2042 (9th Cir. 1965), *affirming* 224 F Supp. 557, 1964 A.M.C. 184 (W.D. Wash. 1963). In such a case the structure is properly referred to as a "building way." O'Leary v. Puget Sound Bridge & Dry Dock Co., *supra* at 575, 1965 A.M.C. at 2046. *Contra*, Port Houston Ironworks, Inc. v. Calbeck, 227 F Supp. 966, 1964 A.M.C. 1026 (S.D. Tex. 1964).

[193] Providing state compensation for injuries upon navigable waters to seamen would work material prejudice to the characteristic features of the general maritime law which is supplemented by the Jones Act. Hardt v. Cunningham, 136 N.J.L. 137, 54 A.2d 782, 1947 A.M.C. 1450 (1947). *Accord*, Alaska Indus. Bd. v. Alaska Packers Ass'n, 186 F.2d 1015 (9th Cir. 1951). See note 45 *supra* and accompanying text. But the Supreme Court has also established that seamen injured on land while in the service of the ship are entitled to maintenance and cure, Warren v. United States, 340 U.S. 523, 1951 A.M.C. 416 (1951), Farrell v. United States, 336 U.S. 511, 1949 A.M.C. 613 (1949), Waterman S.S. Corp. v. Jones, 318 U.S. 724, 1943 A.M.C. 451 (1943), as well as a remedy for negligence under the Jones Act, O'Donnel v. Great Lakes Dredge & Dock Co., 318 U.S. 36, 1943 A.M.C. 149 (1943). Thus seamen injured on land are not entitled to state compensation. Rudolph v. Industrial Marine Serv., Inc., 187 Tenn. 119, 213 S.W.2d 30, 1948 A.M.C. 2009 (1948); Occidental Indem. Co. v. Industrial Acc. Comm'n, 24 Cal. 2d 310, 149 P.2d 841 (1944). Since seamen are also excluded from federal compensation, see text accompanying notes 59-60 *supra*, seamen are not entitled to invoke either federal or state compensation regardless of where the injury occurs.

The "seaman" entitled to sue under the Jones Act has acquired a much broader meaning than the seaman entitled only to maintenance and cure. See Annot., 75 A.L.R.2d 1312 (1961). Therefore, a note of caution is in order for the state claimant injured upon land who may be a "Jones Act seaman" because state courts have held that a Jones Act remedy precludes the benefits of state compensation. See Apperson v. Universal Serv., Inc., 153 So. 2d 81 (La. Ct. App. 1963), flatly holding that a Jones Act remedy is mutually exclusive from state compensation by overruling Beadle v. Massachusetts Bond-

the physical area where there may be concurrent coverage, which compensation remedy may be invoked? Basically, for the purpose of recovering state compensation the determinative factor is the characterization of the employee at the time of his injury, while the recovery of federal compensation is governed by the characterization of the employer. Therefore, recovery under the Longshoremen's Act is not always available to an amphibious worker entitled to state compensation—federal and state compensation are not co-extensive in the field where a state has constitutionally provided compensation for an injury on navigable waters.

Failure to recognize the "twilight zone" as a label for factual determinations of state coverage at the state administrative level led to an erroneous conclusion that state compensation was available to all employees injured on navigable waters without regard to prior precedent which had limited state power. Such a conclusion resulted from misinterpreting *Moores's* and *Baskin* as impliedly overruling that branch of the *Jensen* line of decisions which had held states could not constitutionally provide compensation to ship repairmen injured on navigable waters. Even though *Jensen* itself had not been expressly overruled, both a federal court and a state court adhered to such an interpretation and decided that the "twilight zone" enabled longshoremen injured on navigable waters to recover under the Louisiana compensation statute.[194] This obliteration of all constitutional limits on state power was quickly repudiated,[195] although not without difficulty because the true nature of the "twilight zone" remained unrecognized.[196]

The Constitution is not the only bar to valid state coverage. Longshoremen and ship repairmen are also precluded from recovering state compensation by the Longshoremen's Act. The Longshoremen's Act permits state coverage by virtue of congressional acceptance of the *Jensen* line of decisions denying state coverage to such employees.[197] Therefore, even if *Jensen* and its companion cases were overruled, state compensation would be unavailable to longshoremen and ship repairmen injured on navigable waters because there would be contravention

---

ing & Ins. Co., 87 So. 2d 339, 1956 A.M.C. 1213 (La. Ct. App. 1956), to the extent that it had held there was an overlap between state compensation and a remedy under the Jones Act.

194 See note 131 *supra.*

195 Noah v. Liberty Mut. Ins. Co., 267 F.2d 218, 1959 A.M.C. 2047 (5th Cir. 1959), *reversing on rehearing* 265 F.2d 547, 1959 A.M.C. 573 (5th Cir. 1959). See Ellis v. Travelers Ins. Co., 241 La. 433, 129 So. 2d 729 (1961), where the Supreme Court of Louisiana impliedly overruled Richard v. Lake Charles Stevedores, 95 So. 2d 830, 1957 A.M.C. 2246 (La. Ct. App. 1957) by affirming Ellis v. Travelers Ins. Co., 123 So. 2d 780 (La. Ct. App. 1960).

196 Noah v. Liberty Mut. Ins. Co., *supra* note 195; Ellis v. Travelers Ins. Co., *supra* note 195.

197 See text accompanying note 95 *supra.*

of the essential purpose of an applicable act of Congress. However, all amphibious workers other than longshoremen[198] or ship repairmen[199] may successfully invoke state compensation either on the basis of "local concern" or the "twilight zone."

The "twilight zone" is a much broader theory than "local concern" for sustaining an award of state compensation because it presumes the validity of a factual determination at the state administrative level on the question of the constitutional power of a state to provide compensation. The doctrine of "local concern," provides less opportunity for success upon appellate review of a state award because it involves the actual determination of a question of constitutional law at each step. However, "local concern" has not been entirely eliminated as a theory for successfully invoking state compensation. If the facts of an employee's injury fall squarely within precedent prior to *Davis* which permitted state coverage, it is clear that such an employee is entitled to state compensation as a matter of law [200]

The "twilight zone" is the appropriate theory for obtaining a state award where prior precedent clearly denies state coverage on similar facts[201] or the subject matter of the employment contract is maritime in the sense that it comes within the contract jurisdiction of admiralty [202] The only limitation on this approach is that the injured employee must reasonably be characterized as something other than a longshoreman per se or a ship repairman per se. *Davis* established that an employee does not have to be characterized as a stevedore loading or unloading a vessel upon navigable waters merely because he is piling steel on a barge while aiding in the dismantling of an intrastate bridge. *Moores's* and *Baskin* established that an employee performing duties incidental to the repair of a ship is not precluded from state coverage by virtue of his employer's contract.

---

198 *E.g.*, Robinson v. Lykes Bros. S.S. Co., 170 So. 2d 243 (La. Ct. App. 1964); Mackey v. Standard Stevedoring Co., 131 So. 2d 123 (La. Ct. App. 1961); Gaddies v. Trenton Marine Terminal, Inc., 86 N.J. Super. 125, 206 A.2d 180, 1965 A.M.C. 592 (App. Div. 1965).

199 Flowers v. Travelers Ins. Co., 258 F.2d 220, 1958 A.M.C. 2420 (5th Cir. 1958), *cert. denied*, 359 U.S. 920 (1959); Warner v. Travelers Ins. Co., 332 S.W.2d 789 (Tex. Civ. App. 1960).

200 Travelers Ins. Co. v. Gonzalez, 351 S.W.2d 374 (Tex. Civ. App. 1961) (employee engaged in construction of vessel); Seeler v. Otis Elevator Co., 281 App. Div. 140, 120 N.Y.S.2d 325 (1952) (employee installing elevator on vessel under construction). See Cordova Fish & Cold Storage Co. v. Estes, 370 P.2d 180 (Alaska 1962); Schacht v. Nicolaisen, 283 App. Div. 902, 129 N.Y.S.2d 871 (1954).

201 Hammond v. Albany Garage Co., 267 App. Div. 647, 47 N.Y.S.2d 897 (1944) (characterized as refrigerator repairman rather than ship repairman).

202 "[S]hip on navigable waters undergoing repairs under a maritime contract, and with which appellee was *helping*." Indemnity Ins. Co. of No. America v. Marshall, 308 S.W.2d 174, 176 (Tex. Civ. App. 1957). (Emphasis added.)

There have been a number of "reconversion" cases illustrating the proposition that the characterization of the employee's duties at the time of injury is controlling for the purpose of successfully invoking state compensation. In such cases employees injured on navigable waters while actually repairing a vessel have sought state compensation on the ground that the subject matter of the employment was the reconversion of a vessel rather than ordinary repairs. The rationale of this theory is that the reconversion of a vessel is akin to new ship construction, and that the employee is thus within the ambit of "local concern" defined by *Rohde*. Either on the theory of "local concern" or "twilight zone," or both, state courts have sustained such a contention.[203]

Where the fact situation surrounding an employee's injury on navigable waters materially differs from any prior precedent, it is virtually certain that a factual determination at the administrative level will result in a conclusion that state coverage is not prohibited by the Constitution. Since the subject matter of the employment in such a situation should be non-maritime in the sense that it does not come within the contract jurisdiction of admiralty, a reasonable characterization of the employee as something other than a longshoreman or a ship repairman should be a simple task.[204]

The language within the cases cited provides little, if any, support to the foregoing conclusions concerning the availability of state compensation. The primary reason for the confusion expressed in these cases is that the "twilight zone" has been used as a label for a judicial expedient to sustain state coverage between assumed competing compensation schemes whenever prior precedent did not preclude state coverage on constitutional grounds. Such an expedient has provided

[203] Allisot v. Federal Shipbuilding & Drydock Co., 4 N.J. 445, 73 A.2d 153 (1950); DeGraw v. Todd Shipyards Co., 134 N.J.L. 315, 47 A.2d 338 (Ct. Err. & App. 1946); Kelly v. R.T.C. Shipbuilding Corp., 87 N.J. Super. 313, 209 A.2d 340 (App. Div. 1965); Emmons v. Pacific Indem. Co., 146 Tex. 496, 208 S.W.2d 884 (1948). Compare Behrle v. London Guar. & Acc. Co., 76 R.I. 106, 68 A.2d 63 (1949), *cert. denied*, 339 U.S. 928 (1950). In this case state compensation was applied to an employee actually repairing a vessel not being reconverted. State coverage was upheld on the ground that there would be no interference with maritime uniformity because the ship was a naval combat vessel not engaged in commerce within the ordinary meaning of that term. In Commissioner of Taxation & Fin. v. Oceanic Serv. Corp., 276 App. Div. 725, 97 N.Y.S.2d 401 (1950), the employment contract was characterized as a protective agency and employee thereby a "watchman" rather than a seaman entrusted with the entire ship.

[204] Arp v. Maryland Cas. Co., 170 So. 2d 166 (La. Ct. App. 1964) (injured while repossessing equipment from tug); Jones v. A. C. Steel Pier Co., 25 N.J. Misc. 176, 52 A.2d 48 (Dep't of Labor 1947) (member of "water circus" act fell overboard and drowned); Eldredge v. Weidler, 274 App. Div. 138, 81 N.Y.S.2d 58, 1948 A.M.C. 1904 (1948) (housing construction worker drowned while responding to call for aid by employer's pleasure craft). See S. Rosenbloom, Inc. v. Willingham, 190 Md. 552, 59 A.2d 311 (1948) (industrial engineer drove off ferry and drowned).

stability in the administration of state compensation because the only appellate denials of state awards have been tainted with gross inadequacy of presentation by counsel.[205] In fact, these latter cases indicate that the true nature of the "twilight zone" has remained obscure merely because incomplete analysis and inaccurate presentation by counsel have led courts confronted with confusion to seize upon any appropriate label to sustain state coverage where the constitutional lines were hazy

Although recovery under the Longshoremen's Act is governed by the characterization of the employer, neither a "master or member of a crew of any vessel"[206] nor a government employee is entitled to such compensation.[207] A determination of an employee's status in relation to the latter exception is a simple task. But the former exception is troublesome because it brings to the forefront a mass of apparently irreconciliable decisions which parallel the confusion engendered by section 3(a) and its relation to state compensation.[208] A brief summary, however, will highlight the nature of the problem and provide general guidelines.

The proviso excluding a "master or member of a crew of any vessel" was passed to retain the seamen's remedies under the general maritime law and statutory right to sue for negligence under the Jones Act. The choice of such a phrase rather than the term "seamen" reflected the intent of Congress to preclude longshoremen from suing as seamen under the Jones Act and provide such workers with an exclusive remedy

---

[205] See Atlas Iron & Metal Co. v. Hesser, 177 So. 2d 199, 201-02 (1965), where the Florida Supreme Court erroneously noted that the *Jensen* decision had absolutely precluded state coverage and then concluded that *Calbeck*, by extending federal compensation to the full scope of federal jurisdiction which *Jensen* had originally defined, had eliminated the exceptions to *Jensen* that had subsequently evolved; and Green v. Simpson & Brown Constr. Co., 14 N.J. 66, 101 A.2d 10 (1953), where the New Jersey Supreme Court twelve years earlier stated that Pennsylvania R.R. v. O'Rourke, 344 U.S. 334, 1953 A.M.C. 237 (1953) held flatly that states were powerless to enact compensation even though the only question in that case had been which federal statute applied to an injury on navigable waters. The Supreme Court of Florida had failed to read either *Jensen* or *Calbeck* properly, and the Supreme Court of New Jersey had converted the resolution of a conflict between two federal statutes into a constitutional limitation on state power.

See also Szumski v. Dale Boat Yards, Inc., 90 N.J. Super. 86, 216 A.2d 256 (App. Div. 1966) where the state court erroneously stated that an injury upon the high seas was within the scope of the Longshoremen's Act.

[206] 44 Stat. 1426 (1927), 33 U.S.C. § 903(a)1 (1964).

[207] 44 Stat. 1426 (1927), 33 U.S.C. § 903(a)2 (1964).

[208] This area is in great need of clarification, but the purpose and scope of this comment do not include such an objective. Nevertheless, clarification should be undertaken before an inarticulate concept such as the "twilight zone" comes to the forefront. One writer indicates he favors such an idea. See 2 LARSON, WORKMEN'S COMPENSATION LAW §§ 90.00-.42 (1961).

under the Longshoremen's Act.[209] Although this exclusionary proviso continues to exclude seamen from federal compensation, much confusion has arisen because a "seaman" within the purview of the Jones Act has acquired a much broader meaning than the layman's concept of a seaman.[210]

The Supreme Court has established that who constitutes a seaman within the meaning of the Jones Act is a question of fact to be determined by a jury.[211] The administrative determination under the Longshoremen's Act of who constitutes a "master or member of a crew" is also factual.[212] Since appellate review of such factual determinations has led to a mass of case law defining both concepts, the liberal decisions under the Jones Act are invoked as defenses to federal compensation.[213] While this presents a problem to the compensation claimant, a factual determination in his favor will not be set aside unless unsupported by the facts.[214]

Obviously, a factual determination of the employee's status under whichever remedy is invoked provides for an area of overlap. Whichever remedy is initially invoked would appear to turn on the existence or non-existence of fault by the employer. However, it also appears as though counsel exploit this overlap by first obtaining an award under the Longshoremen's Act as not being a "master or member of a crew" and then proceed to assert a claim as a "seaman" within the Jones Act.[215] Furthermore, such exploitation has received judicial sanction.[216]

If an employee falls within neither exclusionary proviso of section 3(a), the Supreme Court has established that such an employee is entitled to federal compensation if his employer has any employee employed in maritime employment, in whole or in part, in the physical area of potentially concurrent coverage.

Soon after the passage of the Longshoremen's Act an employee of a railroad brought an action against his employer under the Federal

---

[209] See text accompanying notes 59-61 *supra.*

[210] "If the 'standing' requirements of the Jones Act are still to be regarded as having any real content, I can find no room for debate that this individual [a worker on a "Texas Tower"] is not a seaman, unless a 'seaman' is to mean nothing more than a person injured while working at sea." Grimes v. Raymond Concrete Pile Co., 356 U.S. 252, 255, 1958 A.M.C. 1014, 1017 (1958) (dissenting opinion). See Annot., 75 A.L.R.2d 1312 (1961).

[211] Senko v. La Crosse Dredging Corp., 352 U.S. 370, 1957 A.M.C. 891 (1957).

[212] South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251, 1940 A.M.C. 327 (1940).

[213] *E.g.*, Daffin v. Pape, 170 F.2d 622, 1948 A.M.C. 2019 (5th Cir. 1948); Tucker v. Norton, 56 F Supp. 61, 1944 A.M.C. 1086 (E.D. Pa. 1944), *aff'd sub nom.* Tucker v. Branham, 151 F.2d 96, 1945 A.M.C. 1486 (3d Cir. 1945).

[214] Norton v. Warner Co., 321 U.S. 565, 1944 A.M.C. 175 (1944).

[215] See Biggs v. Norfolk Dredging Co., 237 F Supp. 590, 1965 A.M.C. 553 (E.D. Va. 1965), *rev'd*, 360 F.2d 360, 1966 A.M.C. 578 (4th Cir. 1966).

[216] Biggs v. Norfolk Dredging Co., 360 F.2d 360, 1966 A.M.C. 578 (4th Cir. 1966).

Employers' Liability Act[217] for an injury sustained while loading freight into cars located on a car float lying in navigable waters. The Supreme Court held that the Longshoremen's Act provided the only remedy and dismissed the damage suit.[218] Since the employee had been characterized as engaging in a maritime activity by virtue of the fact that he was loading freight on navigable waters,[219] the decision appeared to leave open the question whether or not an employee had to be engaged in a maritime activity in order to obtain federal compensation.

This question was squarely raised before the Supreme Court twenty years later in *Pennsylvania R.R. Co. v. O'Rourke*.[220] In that case the action was also brought under the Federal Employers' Liability Act by an employee of a railroad injured on a car float lying in navigable waters. Contrary to the prior case, this employee had clearly been engaged in "railroad work" because he was injured while releasing the hand brakes of box cars so that they could be pulled off the float by an engine.[221] Nevertheless the district court dismissed the action on the ground that the Longshoremen's Act provided the exclusive remedy.[222] After the circuit court had reversed[223] on the ground that the Federal Employers' Liability Act covered railroad employees while engaged in railroad work on navigable waters,[224] the Supreme Court reversed and reinstated the decision of the district court.

The contention of the employee in *O'Rourke* was that he was engaged in "railroad work" rather than "loading" on navigable waters, and thereby not engaged in maritime employment.[225] The Supreme Court rejected this contention on the ground that the characterization of the employer, not the employee, was controlling:

> the emphasis on the nature of respondent's duties here misses the mark. The statute applies, by its own terms, to accidents on navigable waters when the employer has any employees engaged in maritime service. Besides [section 2(4)] is directed at the employer when it speaks of maritime employment, not at the work the employee is doing. The Court of Appeals, we think, is in error in holding that the statute requires, as to the employee, both injury on navigable waters and maritime employment as a ground for coverage by the Compensation Act.[226]

---

[217] 35 Stat. 65 (1908), 45 U.S.C. §§ 51-60 (1964).

[218] Nogueira v. New York, N.H. & H.R.R., 281 U.S. 128, 1930 A.M.C. 763 (1930).

[219] *Id.* at 134, 1930 A.M.C. at 766-67.

[220] 344 U.S. 334, 1953 A.M.C. 237 (1953).

[221] *Id.* at 334-35, 1953 A.M.C. at 238.

[222] O'Rourke v. Pennsylvania R.R., 99 F Supp. 506, 1951 A.M.C. 2090 (E.D.N.Y. 1951).

[223] O'Rourke v. Pennsylvania R.R., 194 F.2d 612 (2d Cir. 1952).

[224] *Id.* at 615.

[225] Pennsylvania R.R. v. O'Rourke, 344 U.S. 334, 339, 1953 A.M.C. 237, 242 (1953).

[226] *Id.* at 339-40, 1953 A.M.C. at 242.

O'Rourke was a 5-4 decision. But the split merely reflects the disagreement of the Court over the characterization of the employer, through his employee.[227]

Whatever doubt existed subsequent to *O'Rourke* was formally interred in *Calbeck*. In that case employees injured upon navigable waters while engaged in new ship construction were entitled to recover federal compensation. Clearly such employees were not maritime employees. Furthermore, the Court assumed that the employers came within the terms of section 2(4).[228] Therefore, it is settled that for the purpose of obtaining federal compensation it is the characterization of the employer, not the employee, that defines the scope of recovery This also makes clear that not every employee injured on navigable waters can obtain federal compensation.

From the foregoing it is clear that an employee injured in the physical area of potentially concurrent coverage has an election of compensation remedies only if he satisfies three conditions precedent: (1) state compensation legislation may constitutionally apply; (2) the employee does not come within either exclusion of section 3(a) of the Longshoremen's Act; and (3) the employer comes within the terms of section 2(4) of the Longshoremen's Act.

Unless the state may constitutionally provide compensation, there is no problem of election of remedies. In such a situation any proceedings under state legislation would not preclude an injured worker from subsequently invoking federal compensation successfully Since the state tribunal would be without jurisdiction over the subject matter, it could not divest coverage under the Longshoremen's Act.[229] However, if a state tribunal erroneously assumed jurisdiction, a federal court may not enjoin such proceedings even if an award would not be constitutional.[230]

If an employee has an election of compensation remedies, stability in the administration of compensation requires that a binding election be made at some time. Of course, the statute of limitations of one year for filing under the Longshoremen's Act provides an initial safeguard against abuse.[231] However, the liberal view is that a state claim tolls the federal statute during the period of adjudication.[232] Another limit on the power of an election is a voluntary waiver or release validly

---

227 *Id.* at 342, 1953 A.M.C. at 244 (dissenting opinion).

228 Calbeck v. Travelers Ins. Co., 370 U.S. 114, 117 n.4, 1962 A.M.C. 1413, 1415 n.4 (1962).

229 See Newport News Shipbuilding & Dry Dock Co. v. O'Hearne, 192 F.2d 968 (4th Cir. 1951).

230 T. Smith & Son v. Williams, 275 F.2d 397, 1960 A.M.C. 1296 (5th Cir. 1960).

231 44 Stat. 1432 (1927), 33 U.S.C. § 913(a) (1964).

232 Wilson v. Donovan, 218 F Supp. 944, 1964 A.M.C. 120 (E.D. La. 1963).

obtained.[233] The final limitation upon the power of an election should be that once a claim is voluntarily initiated and brought to an award, the claimant should be bound by such an election.[234] This principle has been followed despite statements to the contrary.[235] However, mere voluntary acceptance of state compensation benefits does not preclude resorting to the Longshoremen's Act as long as a federal award is credited with the amount of state benefits received.[236]

CONCLUSION

Jensen was the high point in the expression of a philosophy that the substantive maritime law incorporated into the Constitution could be applied uniformly only if not impaired by the exercise of state power. Unfortunately, the victim of this idealistic philosophy was the recently accepted philosophy of providing compensation to all employees injured in the conduct of a business enterprise by imposing liability without fault upon the employer for such injuries. As a result of this clash between two philosophies, the socially desirable remedy of compensation was unavailable to a large group of persons engaged in rather hazardous employment.

After two unsuccessful attempts to authorize state coverage for such workers, Congress enacted a federal compensation statute to provide the benefits of compensation to those workers that could not constitutionally obtain state coverage. While the congressional purpose was clear, the language of the statute was imprecise. This deficiency, however, would later be a blessing in disguise because the judiciary initially construed the Longshoremen's Act in accord with the congressional intent to provide compensation only when a state was constitutionally powerless to do so. This course of judicial interpretation, however, soon frustrated the purpose of compensation to provide quick and certain relief because constitutional questions regarding the extent of state power were raised in virtually all claims for injuries upon navigable waters regardless whether state or federal compensation was initially invoked. Furthermore, appellate review of administrative decisions was certain if there was no similar prior precedent. However, slight factual distinctions from prior precedent also formed the basis of constitutional questions concerning state power.

---

[233] Comeaux v. Two-R Drilling Co., 236 F Supp. 735, 1965 A.M.C. 1058 (E.D. La. 1964).

[234] For an especially interesting theory framed in terms of "vesting," see Dunleavy v. Tietjen & Lang Dry Docks, 17 N.J. Super. 76, 85 A.2d 343 (Hudson County Ct. 1951).

[235] See Gulf Oil Corp. v. O'Keeffe, 242 F Supp. 881, 1965 A.M.C. 1048 (E.D.S.C. 1965).

[236] Calbeck v. Travelers Ins. Co., 370 U.S. 114, 1962 A.M.C. 1413 (1962); Beasley v. O'Hearne, 250 F Supp. 49, 1966 A.M.C. 1250 (S.D.W Va. 1966).

Against this background, the Supreme Court, led by Justice Black, rendered two decisions within the space of one year which significantly altered the socially intolerable situation that prevailed. Seizing upon the imprecise language in section 3(a) which apparently limited the scope of federal coverage to that field where states were powerless, Justice Black in *Parker* eliminated all questions of constitutional law concerning state power in proceedings under the Longshoremen's Act. The interpretation given to the scope of federal coverage was that it extended beyond the line fixing the limits of state power but did not preempt or encroach upon constitutionally valid state compensation. In *Davis* Justice Black reduced appellate review fixing the limits of state power by converting a question of constitutional law decided at appellate levels into a question of fact to be decided with virtual finality at the state administrative level. Thus, without overruling *Jensen* and its companion cases, appellate review in claims for state compensation would nevertheless be reduced to a minimum.

Despite the desirability of such innovations, and their need to be expressed clearly, the Supreme Court indulged in articulating a "twilight zone" in order to retain the appearance of mutually exclusive coverage presumably necessitated by the fact that both state and federal compensation statutes purported to impose exclusive liability upon the employer. Thus, stability of compensation administration did not reach a maximum because some claimants attempted to explore the limits of a "twilight zone." However, courts did seize upon the label of a "twilight zone" as a judicial expedient to maximize validation of awards obtained at the administrative levels, and thereby achieve greater stability than existed prior to *Parker* and *Davis*.

This development in the stability of compensation led to the actual expression in *Calbeck* of the concurrent coverage which previously had existed. Thus, with the exception of seamen who come under no compensation legislation, virtually all amphibious employees injured upon navigable waters with the exception of longshoremen and ship repairmen are entitled to an election of compensation remedies.

Two factors stand out in the development since the opinions of Justice Black in *Parker* and *Davis*. First, the subtle use of the term "exclusive" by the judiciary in order to retain the appearance of mutually exclusive coverage. By stating that a compensation statute provided the "exclusive" remedy, courts concealed whether the term was being used as a synonym for "only" or merely descriptive of the exclusive liability provision prevailing in all compensation statutes. With this kept in mind many opinions become intelligible that otherwise would not be.

The other factor that stands out is the failure of any counsel to

bring to the attention of any court the fact that congressional action covering all injuries on navigable waters did not necessarily constitute preemption of state coverage. If such a presentation was made, counsel must not have pointed out that the exclusive liability provision of the Longshoremen's Act does not expressly preclude state coverage. Either of these failures, or both, by counsel have forced the courts to resort to concepts such as the "twilight zone" to allow the existence in fact of something apparently impossible.

In conclusion, despite the ambiguity of courts in this area and the maze of technical niceties, it is incredible that a formal structure can be set forth that embraces the actual decisions made in the field of workmen's compensation for injuries upon navigable waters.